Where Rape Does Not Exist:
Tracing the Unsettled Position of Marital Rape in South Africa Through Women's Recourse-seeking Journeys

By

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Declaration

I, ...*Nyasha Karimakwenda*...., hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

Through a feminist and interpretivist lens, this dissertation addresses the present dearth of research on marital rape in contemporary South Africa by exploring contradictory institutional responses to marital rape in legal, policy, and social contexts. Drawing from an array of academic traditions spanning law, the social sciences and the humanities, as well as empirical research with women's rights organisations undertaken by the author, my research question asks: Since the criminalisation of marital rape in 1993, in what ways is marital rape in South Africa rendered (in)visible in and through the institutions where women seek protection from violence? The dissertation argues that despite the criminalisation of marital rape and an emergent women's rights consciousness within the law, formal and informal institutions that survivors seek help from are complicit in fostering conditions that allow for marital rape to persist. These hindrances arise in both overt and subtle forms. Concurrently, the dissertation draws out the kinds of circumstances through which marital rape is revealed, acknowledged and addressed within institutional environments. Tracing women's endeavours to seek protection, the research captures the manner in which Black women are compelled to carry disquieting levels of violence, while also discovering the forms of recourse that eventually do provide them relief. The research findings unearth an interplay of factors that preclude recognition of the scale of sexual violence in marriage, and stifle survivors' ability to find recourse. Amidst this web of barriers, local women's rights civil society organisations play a critical role in assisting survivors and bringing the sexual abuse to light. Through the range of local services offered by these organisations, survivors are progressively empowered to enact changes in their lives and find means of freeing themselves from abuse.

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LIST OF FREQUENTLY USED ACRONYMS & ABBREVIATIONS

Criminal Law Amendment Act (1997)	Minimum Sentences Act
Amendment to Criminal Law Amendment Act (2007)	Minimum Sentences Act Amendment
Domestic Violence Act	DVA
Non-Profit Organisation	NPO
Prevention of Family Violence Act	PFVA
South African Law Commission	SALC
South African Law Reform Commission	SALRC
South African Police Service	SAPS
Sexual Offences Act	SORMA
Supreme Court of Appeal	SCA
Thuthuzela Care Centre	TCC
Violence against women and girls	VAWG

GLOSSARY OF RECURRING TERMS

-thwelwe	The isiXhosa term for the state of having been subjected to the *ukuthwala* process.
Ukuthwala	*Ukuthwala* is the isiXhosa and isiZulu word for the practice of abducting/carrying off a girl or woman for purposes of marriage. Variations of this practice are also found across South Africa amongst tshiVenda, siSwati, xiTsonga, sePedi and IsiNdebele speaking groups, and others.
Makoti	The isiZulu and isiXhosa term for a new wife
Lobola	Loosely translated as "bridewealth" but the meaning and symbolism are more complex than a simple translation conveys. In past times lobola was given in form of cattle but in the present it can be given in the form of money and gifts. Lobola is a central component of customary marriage; given by a man to the family of his intended bride, for purposes of compensating/thanking her family for having raised her, and creating a bond between the two families.

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1.1 Introducing the Research Project

Interwoven in spaces seen and unseen, violence in South Africa embeds itself amongst its people. The legibility of this marking is uneven, for a historical amalgam of legal, cultural and social manipulations renders certain bodies more vulnerable to violence than others. Violence more easily inscribes itself on bodies that hold lesser status in South African society; bodies marked by youth, disability, queerness, Blackness and gender.[1] Though the written law now casts its net wide enough to protect all who inhabit this country, the violence enacted upon bodies marked by "otherness" flourishes, and its victims may rarely find solace in the law.

Marital rape is perhaps the quintessence of these contradictions. Historically, iterations of legal, cultural and social ordering condoned marital rape, designating it as an act outside the bounds of criminality and immorality. Though the Prevention of Family Violence Act (PFVA)[2] criminalised marital rape in 1993, the history of legal inequities against wives, and the continuing force of social and cultural accommodations of marital rape, remain underacknowledged and under-researched. Within the literature and policy discourse, there is minimal understanding and examination of how the legacy of sanctioned sexual violence in marriage, filters into institutions that women seek recourse from. Simultaneously, there is a paucity of research on the distinct intricacies that surface in the help-seeking journeys of survivors of marital rape.

This dissertation addresses the present dearth of research on marital rape in contemporary South Africa by exploring the contradictory institutional responses to

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[1] Pumla Gqola, "Brutal Inheritances: Echoes, Negrophobia and Masculinist Violence" in *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*, ed. Shireen Hassim, Tawana Kupe, and Eric Worby (Johannesburg: Wits University Press, 2008).

[2] Prevention of Family Violence Act 133 of 1993 (PFVA).

marital rape in local legal, policy, and social contexts. The aim of the present research is to uncover a range of ways in which sexual violence in heterosexual marriages and marriage-like relationships is rendered invisible in the very places that women go to in order to seek protection from violence; and in juxtaposition, to draw out the sometimes unexpected and indirect modalities through which marital rape is revealed, acknowledged and addressed within these environments. Tracing women's journeys in seeking protection, the research unearths how wives are compelled to carry disquieting levels of violence, while also elucidating the forms of recourse that eventually do provide them relief.

The findings detail whether and how marital rape is confronted in certain recourse settings such as courts, police stations, community organisations, and family units. Drawing from an array of academic traditions spanning law, the social sciences and the humanities, as well as empirical research with women's rights non-profit organisations (NPOs) undertaken by the author, this research serves as a critical contribution to the relatively sparse scholarship on marital rape in South Africa. My research question asks: *Since the criminalisation of marital rape in 1993, in what ways is marital rape in South Africa rendered (in)visible in and through the institutions where women seek protection from violence?*

The overarching research question is informed by sub-questions that I engage with in the chapters of the dissertation, and which are summarised at the end of this chapter. My central argument that threads the questions together is that in contemporary South Africa, formal and informal institutions that survivors seek help from are complicit in fostering conditions that allow for marital rape to persist, and there is an interplay of locally determined factors that preclude recognition of the scale of sexual violence in marriage, and stifle survivors' ability to find recourse.

1.2 Definitions

Given the cultural and racial make-up of South Africa, the definition of marriage that I apply in my research is broad. I define marriage as a formal familial union between two parties enacted via civil, religious and/or cultural routes, appreciating that each

tradition has its own rituals and representations of marriage. For customary (i.e. Black indigenous) marriage forms, I also include the customs through which such marriages are initiated, for example the abduction or carrying away of the intended bride. Though there are many variations of abduction for purposes of marriage within the diverse groupings that comprise South Africa, I employ the label *ukuthwala* as a general designation for the practice given the salience of the term in present literature and public discourse.[3] I do not discount the existence of abuse and rape within same-sex marriages, however due to the background of legal and cultural powers granted to men over wives, my dissertation exclusively addresses heterosexual marriages.[4]

Legally prescribed definitions of rape are ever-shifting, socially and culturally contingent, and limited in reflecting women's perspectives of violence.[5] In South Africa the present statutory definition of rape is broadly framed, having greatly expanded the common law definition of rape.[6] Though not taking the present statutory definition of

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[3] "Ukuthwala" is the isiXhosa and isiZulu word for the practice of abducting/carrying off a girl or woman for purposes of marriage. Variations of this practice are also found across South Africa amongst tshiVenda, siSwati, xiTsonga, sePedi and IsiNdebele speaking groups, and others.

[4] See for example: Lori Girshick, "No Sugar, No Spice: Reflections on Research on Woman-to-Woman Sexual Violence," *Violence Against Women* 8, no. 12 (2002); Susan Turell et al., "Lesbian, Gay, Bisexual, and Transgender Communities' Readiness for Intimate Partner Violence Prevention," *Journal of Gay & Lesbian Social Services* 24, no. 3 (2012); Emily Simpson and Christine Helfrich, "Lesbian Survivors of Intimate Partner Violence: Provider Perspectives on Barriers to Accessing Services," *Journal of Gay & Lesbian Social Services* 18, no. 2 (2005); Dena Hassouneh and Nancy Glass, "The Influence of Gender Role Stereotyping on Women's Experiences of Female Same-Sex Intimate Partner Violence," *Violence Against Women* 14, no. 3 (2008).

[5] See Estelle Freedman, *Redefining Rape* (Cambridge Harvard University Press, 2013); Kersti Yllö and M. Gabriela Torres, *Marital Rape: Consent, Marriage, and Social Change in Global Context* (Oxford; New York: Oxford University Press, 2016), 1; Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 171-83.

[6] Under common law, the crime of rape was limited to the penetration of a vagina by a penis, without the woman's consent. In contrast, Chapter 2, section 3 the Sexual Offences Act of 2007 defines rape as follows: "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a

rape for granted, I prefer to conceptualise marital rape through a feminist lens, seeing it as part of a continuum of sexual violence.[7]

In the realm of male-female interactions, Kelly proposed the notion of a continuum to underscore two salient features of sexual violence, the first being that forms of sexual harm, "no matter how seemingly disparate," are "part of the same social phenomenon, i.e. that of men's social control of women."[8] Secondly the concept of a continuum imparts that "at the level of social experience, these disparate forms of behaviour are not easily distinguished" and they "blur" into one another.[9] Seeing rape as an extreme manifestation of harm along the sexual violence continuum, I concur with MacKinnon's position that rape "should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime."[10] This definition takes into account the social inequalities that exist between men and women. It contemplates the difficulty of including consent in the definition of rape since the idea of consent tends to be premised on androcentric conceptions of sexual scripts and violence.[11]

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complainant ('B'), without the consent of B, is guilty of the offence of rape." Chapter 1 of the Act defines sexual penetration as "any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person…

See Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA).

[7] Liz Kelly defines sexual violence as "any physical, visual, verbal or sexual act that is experienced by the woman or girl, at the time or later, as a threat, invasion or assault, that has the effect of hurting her or degrading her and/or takes away her ability to control intimate contact." Liz Kelly, *Surviving Sexual Violence* (Cambridge: Polity Press, 1988), 41.

[8] Ibid., 76.

[9] Ibid.

[10] MacKinnon, *Toward a Feminist Theory of the State*, 245.

[11] Ibid., 173-74, 77, 245.

In describing the women who have been raped by their husbands, I refer to them as survivors, and not victims. I support Kelly's contention that the term victim "makes invisible the other side of women's victimisation: the active and positive ways in which women resist, cope and survive."[12] That women literally survive rape is a triumph, for too often intimate partner abuse results in the murder of the abused by her abuser.

The word "institution" carries unique connotations within different fields. For purposes of my research I conceive of institutions as forms of support for purposes of help-seeking, that are either formal or informal in nature. Following the categories employed by Liang et al. in their research on help-seeking, formal institutions can include the police, courts, social services agencies, mental health providers, churches, and persons/organisations that assist survivors of violence.[13] In providing emotional and material forms of assistance, a survivor's immediate social network of family and friends represent informal institutions.[14]

I utilise the expression "(in)visibility" in an abstract sense as well as a concrete one. The parenthesis within the word signifies that I am leaving room for contradictions and texture, creating an account that is not tied to any particular outcome but allows for seemingly contrasting themes to exist alongside one another. This comports with the interpretivist approach I adopt to understanding my empirical data. Within an interpretivist research paradigm, I seek to understand the phenomena from the standpoint of human experience.[15] My analysis therefore eschews fixed and imposed understandings of women's experiences and how institutions respond to marital rape. I discover multiple and co-existing meanings from the perspectives of the subjects implicated in the study. In the abstract sense, invisibility speaks to the question of whether marital rape is recognised

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[12] Kelly, *Surviving Sexual Violence*, 162.

[13] Belle Liang et al., "A Theoretical Framework for Understanding Help-Seeking Processes among Survivors of Intimate Partner Violence," *American Journal of Community Psychology* 36, no. 1-2 (2005): 72.

[14] Ibid.

[15] Rachel Ormston et al., "The Foundations of Qualitative Research," in *Qualitative Research Practice: A Guide for Social Science Students and Researchers*, ed. Jane Ritchie, et al. (Los Angeles: Sage, 2013), 12.

as an injustice worthy of redress and correction; essentially whether it is seen as a violation of a women's dignity. The more concrete connotation of invisibility concerns whether and how marital rape as a subject comes to the surface as women engage with formal and informal institutions.

1.3 The Theoretical Framework of Feminism

My research project is about the erasure, as well as the recovery, of women's voices and experiences. It is a critique of the current state of South Africa's institutions; a revelation of their failings in respect of violence that plagues women in their most intimate and hidden spaces. In parallel, my research also bares the points of progress within institutions and the manner in which women are agitating for and effecting change in respect of violence committed against them. The research says much about the condition of the Black woman's body and personhood in contemporary South Africa, and it is for this reason that I anchor my work within African and Black-oriented feminist theories.[16]

There are an infinite number of feminism(s) growing out of temporal shifts, regional positioning and identities.[17] To enter into ongoing debates about the ineffectuality and limitations of certain feminist ideologies is futile, for rigidified conceptions of any philosophy would fail to fully characterise the multifaceted nature of women's lives and outlooks. Reductive and unbending notions of what "true" feminism is alienate women who reject or do not see the relevance of such prescripts in their lives.

To illustrate the alienating potential of feminist theorising in the African context, I consider the following examples. Acholonu coined the term "motherism," which she posited as the antithesis of Western feminism and the answer to afro-oriented feminism.[18]

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[16] For the South African context, I include all non-whites within the category of Black.

[17] For an overview of the variations of feminism relevant to the African context see Desiree Lewis, "African Feminisms," *Agenda* 16, no. 50 (2001).

[18] Catherine O Acholonu, *Motherism: The Afrocentric Alternative to Feminism* (Owerri: Afa Publications, 1995).

In parallel with Acholonu, Mikell propounds an emergent form of African feminism that is "distinctly heterosexual, pro-natal and concerned with many 'bread, butter, culture, and power' issues."[19] Perspectives such as those of Acholonu and Mikell that rest on conservative notions of African feminism cannot be dismissed outright, for they represent a certain ethos that responds to the perceived hegemony of Western feminism.[20] Nonetheless, constricted philosophies of what African feminism means preclude the range of peripheral voices that feminism is ostensibly designed to centre, for example gender non-conforming individuals.[21]

The fixed categories of feminism run the risk of being too closely tied to identity politics, taking focus away from the practice of feminism. Labels detract from the larger issues of women's disempowerment and move us no closer to undoing discrimination or learning more about women's realities.[22] Matebeni comments that conflating identity with practice creates "hegemonic generalizations and essentialisms that assume a unified interpretation" of feminism and other categories.[23] These "generalizations efface the problems, perspectives and political concerns of women marginalized because of their class, gender, race, religion, ethnicity and sexual orientation."[24]

Further, pressing and moulding African women into essentialised ideals of African womanhood in fact perpetuates the very forms of violence that feminism(s) seek to undo. As Muholi has argued, the rape of Black lesbians "reconsolidates and reinforces African

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[19] Gwendolyn Mikell, *African Feminism: The Politics of Survival in Sub-Saharan Africa* (Philadelphia: University of Pennsylvania Press, 1997), 4.

[20] Ibid.

[21] Wendy Isaack, "In Conversation. Pumla Dineo Gqola Speaks with Wendy Isaack," *Agenda* 6 (2006).

[22] Elaine Salo, "Talking About Feminism in Africa," *Agenda* 16, no. 50 (2001): 61.

[23] Zethu Matebeni, "Exploring Black Lesbian Sexualities and Identities in Johannesburg" (PhD diss., Faculty of Humanities, University of the Witwatersrand, 2011), 23.

[24] Ibid.

women's identity as heterosexuals, as mothers, and as women."[25] To move away from imposing templates of African womanhood, it is incumbent upon African feminist theorists to employ paradigms that do not ignore the unique histories and social make-up of the continent's people, but that also leave room for vibrant and evolving formulations of feminist thought and practice.

For purposes of my research project, I have found it more constructive to ascertain how feminism can be a tool and a framework with which the experiences and challenges of African women can be rendered legible and visible. As opposed to conceiving of a dogmatic feminism that perpetually places woman in the position of the victim and the oppressed, Oyèwùmí posits that the feminist project is about "female agency and self-determination."[26] To undertake the practice of feminism is to "stir" and "unsettle" male-centricity in order to liberate women.[27] The subversive acts of stirring and unsettling reaffirm the practice of feminism, avoiding identity-driven approaches. Taking heed of the lenses through which I present my findings, my research aims are bound up with my own identity as a Black feminist woman committed to advancing women's and queer people's rights. Consequently, my perspectives are shaped by my positioning in a racialised and gendered society, and it is from the meanings imbued in my identities that I "stir" and "unsettle."

As my dissertation primarily explicates the experiences of Black women, it is also important that I analyse their "the intersecting categories and multiple embodied experiences."[28] I accordingly strike a careful balance, heeding the cautions about essentialist forms of African feminism, but also exposing the threads of racial inequality

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[25] Zanele Muholi, "Thinking through Lesbian Rape," *Agenda* 18, no. 61 (2004): 122.

[26] Oyèrónkẹ́ Oyèwùmí, *African Women and Feminism: Reflecting on the Politics of Sisterhood* (Asmara: Africa World Press, 2003), 1-2.

[27] Patricia van der Spuy and Lindsay Clowes, "Review: Accidental Feminists? Recent Histories of South African Women," *Kronos* 33 (2007): 213; Amina A Mama, "Women's Studies and Studies of Women in Africa During the 1990s," (CODESRIA Working Paper Series, No. 5, 1996), 2.

[28] Muholi, "Thinking through Lesbian Rape," 123.

that weave themselves throughout the lives of Black South African women. Gender violence exists across the breadth of South Africa, leaving no racial, religious or class group untouched.[29] Nevertheless, women's experiences of violence are not the same, and to ignore the filters of race and class would be to inauthentically present Black women's realities.[30] The tentacles of colonialism and apartheid indefatigably reach into the present, so that women in South Africa are not simply women but are women and "other." Those who found themselves at the bottom of apartheid's strict hierarchies are in many ways still submerged in conditions of poverty, violence and insecurity.

Given South Africa's racialised and classist history, I draw parallels from American Black feminist thought. In line with Mama and Matebeni, Collins argues that it is less important to argue what labels are suitable (for example, womanism, Afrocentric feminism or Black feminism), or to contest the content and definition of these labels.[31] Instead, one should examine the reasons for the existence of Black feminist theoretical traditions. Analogous to the South African context, Black feminist thought appreciates the history of intersecting forms of oppression against Black women and works to resist these oppressions.[32] Though it flows from a history of subjugation, Black feminism simultaneously emphasises the agency of Black women.[33] Moreover, it takes stock of the diversity in their social and class positioning, while acknowledging common challenges.[34]

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[29] Helen Moffett, "'These Women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post-Apartheid South Africa," *Journal of Southern African Studies* 32, no. 1 (2006): 137.

[30] Kimberlé Crenshaw, "Mapping the Margins: Identity Politics, Intersectionality, and Violence against Women," *Stanford Law Review* 43, no. 6 (1991): 1242.

[31] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (London, New York: Routledge, 2002), 22.

[32] Ibid., 4, 22-24.

[33] Harris-Perry writes: "Sisters are more than the sum of their relative disadvantages: they are active agents who craft meaning out of their circumstances and do so in complicated and diverse ways." See Melissa Harris-Perry, *Sister Citizen: Shame, Stereotypes, and Black Women in America* (New Haven: Yale University Press, 2011), 47.

[34] Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, 27-28; Audre Lorde, *Zami: A New Spelling of My Name* (Watertown: Persephone Press, 1982).

And, as a practice, Black feminism is about clarifying, discovering, reinterpreting the ideas and experiences of Black women in the face of silencing.[35]

The subjects of silencing and erasure resound in feminist theory concerning Black women in South Africa. The writings of Gqola speak to the importance of interrogating contemporary violence against women and girls (VAWG) grounded in an awareness of the disturbing and unresolved legacies wrought by apartheid.[36] The legacies of largely unacknowledged violence against Black women during apartheid render them "disposable citizens."[37] Motsemme's critical work on the silences of Black women who testified before the Truth and Reconciliation Commission (TRC) is of significant import in unveiling hidden forms of violence against Black women. Admittedly feminist practice seeks to unearth Black women's voices for they have long been suppressed; but such a practice presupposes, as the TRC did, that the world is "only knowable through words."[38] Both Mostemme and Gqola encourage a feminist analysis that not only searches for and disinters women's narratives, but also one that finds meaning in silences.[39] Silence "within a violent everyday can also become a site for reconstituting 'new' meanings and can become a tool of enablement" for survivors.[40]

The feminist framing of my research engenders the asking of demanding and imaginative questions. It provokes one to go beneath the surface of legislative frameworks, policy efforts, and scholarship on women, to identify what such developments denote about the state of marital rape and the condition of Black women in South Africa. It

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[35] Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, 27-28.

[36] See generally Pumla Dineo Gqola, "How the 'Cult of Femininity'and Violent Masculinities Support Endemic Gender Based Violence in Contemporary South Africa," *African Identities* 5, no. 1 (2007).

[37] Ibid., 120.

[38] Nthabiseng Motsemme, "The Mute Always Speak: On Women's Silences at the Truth and Reconciliation Commission," *Current Sociology* 52, no. 5 (2004): 914, 16-17.

[39] See generally ibid., 16; Pumla Gqola, *Rape: A South African Nightmare* (Johannesburg: MFBooks, 2015).

[40]Motsemme, "The Mute Always Speak," 917.

inspires one to ask whether the developments are thwarting or enabling the liberation of women. The feminist paradigm also incites a certain restlessness, for undertaking feminist research requires the creation of multi-dimensional accounts of women's lives, and the influence of the forces around them. Based upon the examples set by Gqola and Mostemme, my research pays attention to silences, both on the part of institutions and women themselves, in order to make meaning of these silences and to render a much more complex picture of marital rape and the violence that Black women bear.

1.4 Locating Marital Rape in South Africa and Revealing the Gaps

Guided by practice of both African and Black feminism(s), in this section I lay out the bodies of literature that inform the study and also specify the gaps that my research seeks to fill. Though housed in the discipline of law, my research is by necessity and preference interdisciplinary, using methodologies that are better equipped to empirically probe embodiments of intimate partner sexual violence, and to interrogate institutional and social hegemonic norms. I have identified three broad theoretical groupings that feed into the sub-questions that I apply in this dissertation. Within these groupings I identify the gaps that my research addresses.

Under the umbrella of feminist jurisprudential and criminology literature, I commence by surveying debates on the utility of the law in protecting women, and scholarship on the persistence of rape stereotypes and the attrition of rape cases in the criminal justice system. The second section considers both comparative and South African studies on rape in intimate, family and marital settings. Within this section, I narrow down to consider South African public health, psychology, ethnographic and historical literature on sexual violence to extract questions that are specifically relevant to marital rape. In the third and final section, I discuss literature that evokes the complexities of help-seeking for survivors of sexual violence, and provides more fluid frameworks for conceptualising the help-seeking processes of marital rape survivors in South Africa.

1.4.1 Feminist Debates About the Law's Utility

There are ongoing debates about the law's potential to truly transform and improve the lives of women. Some contributions have focused upon the male-centric personality of the law, a standpoint most vividly captured by MacKinnon's unwavering conclusion that the "law sees and treats women the way the men see and treat women."[41] Historically, the form and interpretation of rape laws has unquestionably benefitted men, as rape has traditionally been "defined according to what men think violates women."[42]

In spite of law reforms, feminist thinkers have drawn attention to the limited impact of legislation in light of the discriminatory attitudes that adjudicators carry, the institutionalisation of androcentrism, as well as how the law falls short of meaningfully rectifying the forms of violence meted out to women.[43] But, even where feminists initially exercise influence in law reform processes, the reform focuses may ultimately shift. This was the case with the creation of the South African Sexual Offenses Act (SORMA) in 2007, where the course of law reform firstly prioritised expanding the scope of protection for victims; but over time veered away from the victim-centric ethos to concentrate on the creation of new crimes and their prosecution.[44]

Moreover, feminist critiques of the rhetoric of rape judgments expose the familiar

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[41] Catharine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs* 8, no. 4 (1983): 644.

[42] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975), 67-82; Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University, 1994), 86.

[43] Lynn Schafran, "There's No Accounting for Judges," *Albany Law Review* 58, no. 4 (1995): 1068; Nancy Fraser, "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" (presentation, The Tanner Lectures on Human Values, Stanford University, April-May 1996. https://tannerlectures.utah.edu/_documents/a-to-z/f/Fraser98.pdf), 16; Robin West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory," *Wisconsin Women's Law Journal* 3 (1987): 116.; Carol Smart, *Feminism and the Power of Law* (London: Routledge, 2002), 5.

[44] See Introduction to Lillian Artz and Dee Smythe, *Should We Consent?: Rape Law Reform in South Africa* (Cape Town: Juta and Company Ltd, 2008), 2.

tropes of justifiable male sexual entitlement and female blameworthiness in judicial language; rhetoric that paints rape as an inconsequential act.[45] Scholars have noted the crude erasure of women and girls' dignity in South African rape jurisprudence since the enactment of a law prescribing minimum sentences in 1997.[46]

Despite the law's resounding shortcomings, it cannot simply be an ineffectual tool. Kapur and Cossman maintain that "(i)t is not sufficient to simply assert that law is patriarchal, or that the law makers are sexist."[47] This view "tells us very little about the precise workings of the law, and even less about if and how women can use the law."[48] In this vein, feminist legal scholars have highlighted the symbolic power of the law and law reform. Legislation can be of "liberating value" and "reinforces emerging conceptions concerning the status of women and the right of self-determination in sexual conduct."[49] Building upon this idea of the law as symbolic, Artz and Smythe assert that the role of feminist jurisprudence is to "use feminism as a corrective measure to address male bias in law and legal scholarship"; and while the "law is not the answer to patriarchy… it is a

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[45] In South Africa, see for example *Ndou v S* 2014 (1) SACR 198 (SCA); *S v Ntuli* [2005] JOL 12442 (ECLD); *Ntholeng v S* [2004] JOL 13024 (O).

[46] Joel Modiri, "The Rhetoric of Rape: An Extended Note on Apologism, Depoliticisation and the Male Gaze in Ndou v S," *South African Journal on Human Rights* 30, no. 1 (2014); Nicole Kubista, "Substantial and Compelling Circumstances: Sentencing of Rapists under the Mandatory Minimum Sentencing Scheme," *South African Journal of Criminal Justice* 18, no. 1 (2005); Yonina Hoffman-Wanderer, "Sentencing and Management of Sexual Offenders," in *Should We Consent? Rape Law Reform in South Africa*, ed. Lillian Artz and Dee Smythe (Claremont: Juta, 2008); Rebecca Chennells, "Sentencing: The Real Rape Myth," *Agenda* 23, no. 82 (2009); Kristina Scurry Baehr, "Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa," *Yale Journal of Law and Feminism* 20 (2008).

[47] Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996), 30.

[48] Ibid.

[49] Archana Parashar, *Women and Family Law Reform in India. Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992), 33; Miriam Benson, "Rape Law: A Feminist Legal Analysis," *Medicine and Law* 8 (1989): 308.

powerful arena in which the experiences of 'violence' are articulated and visions of justice are promoted."[50]

Engaging with the law from a feminist position is therefore both a pragmatic and aspirational exercise; an exercise attuned to the intractable relationship between the law and patriarchy. The feminist project nonetheless encourages a harnessing of the law's power in order to bring about gradual (albeit uneven) change, and to offer a vision of a more gender equal society.

1.4.2 The Prevalence of Rape, Rape Attrition and Rape Myths

While accepting that South African law sends powerful ideological messages about women's rights, and can result in gradual change, rape remains inexorably prevalent in the present. Studies have broadcasted that one in four South African men have committed rape.[51] And as recently as 2016, a community study conducted in the Gauteng province township of Diepsloot, found that 28% of men interviewed had raped during their lifetime.[52]

Responding to the crisis of rape, feminist scholars and advocates continue to grapple with the problematic trajectory of rape cases disappearing out of the South African criminal justice system – this attrition being attributed to various factors including discriminatory practices, stereotypes, inadequate police resources and training, and

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[50] Artz and Smythe, *Should We Consent?*, 15.

[51] A Medical Research Council study released in 2009 reported the following based on a survey undertaken with a broad cross-section of men in three provinces: "Overall, 27.6% of the men interviewed reported ever having raped a woman or girl, and 4.6% of all men had raped in the past year. Because most men who raped reported multiple rapes, non-partner rape was overall more common than partner rape. In all, only 4.6% of men report that they had raped a partner and not raped a woman who was not a partner (i.e. an acquaintance or stranger). 11.7% of men had raped an acquaintance or stranger (but not a partner) and 9.7% had raped both." See Rachel Jewkes et al., *Understanding Men's Health and Use of Violence: Interface of Rape and Hiv in South Africa* (Pretoria: South African Medical Research Council, 2009), 3.

[52] "Findings from the Sonke Change Trial," Sonke Gender Justice, 5 December 2016, http://genderjustice.org.za/publication/mens-use-violence-women/.

substandard investigating.[53] In the first place, most rapes are not reported to authorities. A widely accepted estimation in South Africa states that only one in nine rape victims reports, and a recent Gauteng study reports a dire figure of one in 25.[54] For cases that do enter the criminal justice system, a 2003 study of rape attrition in Gauteng provided a startling picture of just how few of the total reported cases lead to convictions. It found that 4.1% of reported cases resulted in rape convictions.[55] A newly released countrywide study titled *Rape Justice in South Africa* (RAPSSA) calculated that a guilty verdict is only handed down in 8.6% of rape cases.[56] Updating the 2003 Gauteng study, RAPSSA records only nominal progress in terms of convictions for rape in Gauteng.[57]

Patriarchal tropes of gender and sexual violence have long been cited as a significant reason for the attrition of cases. The rape myth concept originated in the mid-

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[53] Lisa Vetten et al. *Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng* (Johannesburg, Pretoria: Tshwaranang Legal Advocacy Centre, South African Medical Research Council, and the Centre for the Study of Violence and Reconciliation, 2008); Lillian Artz and Dee Smythe, "Case Attrition in Rape Cases: A Comparative Analysis," *South African Journal of Criminal Justice* 20, no. 2 (2007); Lillian Artz and Dee Smythe, "Losing Ground? Making Sense of Attrition in Rape Cases," *South African Crime Quarterly* 2007, no. 22 (2007); Virginia Francis and Michelle India Baird, "A Rape Investigation in the Western Cape: A Study of the Treatment of Rape Victims at Three Police Stations in the Cape Flats," (New York: Vera Institute of Justice, 2000); Lisa Vetten and Danielle Motelow, "Creating State Accountability to Rape Survivors: A Case Study of Boksburg Regional Court," *Agenda* 18, no. 62 (2004); Dee Smythe and Samantha Waterhouse, "Policing Sexual Offences: Policies, Practices and Potential Pitfalls," in *Should We Consent? Rape Law Reform in South Africa*, ed. Lillian Artz and Dee Smythe (Cape Town: Juta, 2008); Mercilene Machisa et al., *Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012* (Pretoria: Gender and Health Research Unit, South African Medical Research Council, 2017).

[54] Rachel Jewkes and Naeema Abrahams, "The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview," *Social Science & Medicine* 55, no. 7 (2002); Mercilene Machisa et al., *The War at Home: Gender Based Violence Indicators Project* (Johannesburg: Gender Links and the South African Medical Research Council, 2011).

[55] Vetten et al., "Tracking Justice."

[56] Machisa et al., *Rape Justice in South Africa*,13.

[57] Ibid., 14.

1970s in the United States of America (USA), beginning with the work of sociologists Schwendinger and Schwendinger, and feminist author Brownmiller.[58] Their initial theorising established a foundation for a multitude of studies about rape stereotypes, including their presence in the legal sphere. Utilising the rape myth paradigm, experts have reasoned that rape cases are judged by police, prosecutors and judges against a standard of what they deem to be "real rape," a stereotyped conception of sexual violence that is deployed to narrowly circumscribe the range of cases that are deemed serious and worthy of police, prosecutorial and judicial resources and remedying.[59] On the basis of myths, the ideal prototype of rape typically involves strangers, use of weapons, extreme violence and visible injuries, quick reporting of the crime on the part of the victim, and a victim that is deemed respectable.[60] Kelly adds that the real rape template also affects the victim's own view of her case and how it may be received by officials.[61]

For my assessment of how rape myths operate in the social and legal contexts, I engage neutralisation theory, which depicts how linguistic techniques are used to legitimise deviant behaviour.[62] An individual's rationalisations arise from an awareness of normative expectations of the culture they are embedded in. Taking the disavowal

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[58] Julia Schwendinger and Herman Schwendinger, "Rape Myths: In Legal, Theoretical, and Everyday Practice," *Crime and Social Justice* 1 (1974); Brownmiller, *Against Our Will.*

[59] Estrich coined the term 'real rape'. See Susan Estrich, *Real Rape* (Cambridge: Harvard University Press, 1987).

[60] Ibid.; Cassia Spohn, Dawn Beichner, and Erika Davis-Frenzel, "Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the 'Gateway to Justice'," *Social Problems* 48, no. 2 (2001); Zsuzsanna Adler, *Rape on Trial* (London: Routledge, 1987); Patricia Frazier and Beth Haney, "Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives," *Law and Human Behavior* 20, no. 6 (1996); Liz Kelly, *Routes to (in)Justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases,* (London: Her Majesty's Crown Prosecution Service Inspectorate, 2001).

[61] Kelly, "*Routes to (in)Justice*."

[62] C. Wright Mills, "Situated Actions and Vocabularies of Motive," *American Sociological Review* 5, no. 6 (1940); Gresham Sykes and David Matza, "Techniques of Neutralization: A Theory of Delinquency," *American Sociological Review* 22, no. 6 (1957); Marvin Scott and Stanford Lyman, "Accounts," *American Sociological Review* 33 (1968).

techniques further, feminist social scientists have shown how neutralisation techniques are applied to dehumanise rape victims and the harm caused by rape; and that this language is actually a reflection of mainstream culture.[63]

I underscore the centrality of culture so as not to depict rape myths as predetermined and uniform. Evolving literature on rape myths has reworked and refined theories and measurement frameworks of rape myth acceptance (RMA). [64] Social science scholars are gradually incorporating cultural, social and temporal factors to study RMA.[65] The evolved theory stresses that the content and operation of rape myths are ever shifting and dependent on localised dynamics.[66]

South African literature has moved in the direction of problematising the rape myth concept as applied to the criminal justice system by incorporating a broader range of factors to explain the outcome of reported rapes. In a study of policing at eight

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[63] Diana Scully and Joseph Marolla, "Convicted Rapists' Vocabulary of Motive: Excuses and Justifications," *Social Problems* 31, no. 5 (1984); Stevi Jackson, "The Social Context of Rape: Sexual Scripts and Motivation," *Women's Studies International Quarterly* 1, no. 1 (1978).

[64] See Martha Burt, "Cultural Myths and Supports for Rape," *Journal of Personality and Social Psychology* 38, no. 2 (1980); Hubert S Feild, "Attitudes toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens," *Journal of Personality and Social Psychology* 36 (1978); Kimberly Lonsway and Louise Fitzgerald, "Attitudinal Antecedents of Rape Myth Acceptance: A Theoretical and Empirical Reexamination," *Journal of Personality and Social Psychology* 68, no. 4 (1995); Kimberly Lonsway and Louise Fitzgerald, "Rape Myths. In Review," *Psychology of Women Quarterly* 18, no. 2 (1994); Eliana Suarez and Tahany M Gadalla, "Stop Blaming the Victim: A Meta-Analysis on Rape Myths," *Journal of Interpersonal Violence* 25, no. 11 (2010); Gerd Bohner et al., "Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator," in *Rape: Challenging Contemporary Thinking*, ed. Miranda A. H. Horvath and Jennifer Brown (Devon: Willan Publishing, 2009).

[65] Lonsway and Fitzgerald, "Attitudinal Antecedents."; Lonsway and Fitzgerald, "Rape Myths."; Heike Gerger et al., "The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English," *Aggressive Behavior* 33, no. 5 (2007).

[66] Joanne Conaghan and Yvette Russell, "Rape Myths, Law, and Feminist Research: 'Myths About Myths'?," *Feminist Legal Studies* 22, no. 1 (2014); Gerger et al., "The Acceptance of Modern Myths."; Bohner et al., "Rape Myth Acceptance."

jurisdictions in South Africa, Smythe determined that whether a case proceeded in the investigation phase depended less on stereotypes at the reporting stage, and more on how the victim presents herself during the investigation, and what level of dedication and attention she was able to bring to the investigation of her case.[67] Additionally, Smythe argues that the real rape template has limited applicability in South Africa. As South African society is inured to all but the most egregious acts of violence, this sets the bar higher for victims.[68] Overall, Smythe's contribution clarifies that there are structural factors such as immense poverty and family pressure that make it infinitely harder for women to engage with the criminal justice system in the taxing manner that it demands.[69]

The newly released RAPSSA study further dissects how cases make their way (or fail to) through the criminal justice system. Introducing a comprehensive series of analytical categories, and applying both qualitative and quantitative methodologies, the report bares a chain of hurdles for survivors, from engaging with the South African Police Service (SAPS) to all the subsequent actors and stages of the process.[70] These include: lack of police emotional investment in arresting perpetrators; poor police training; low police morale; the police's problematic assessment of which cases are severe; the availability of corroborating evidence; prosecutors selectively proceeding with cases based on a desire to meet performance measures; and the time-consuming nature of investigating and preparing cases.[71]

Analogous to Smythe's conclusions about structural barriers, RAPSSA identified that many survivors withdraw their cases in order to proceed with their lives.[72] Despite

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[67] Dee Smythe, *Rape Unresolved: Policing Sexual Offences in South Africa* (Cape Town: University of Cape Town Press, 2015), 194-95.

[68] Ibid., 186, 96.

[69] Ibid., 198-99.

[70] South Africa's national police force, comprising of various ranks of officers, detectives, and senior management officials.

[71] Machisa et al., *Rape Justice in South Africa*, 107, 14-15.

[72] Ibid.

the breadth of factors incorporated in the study, one of its findings signals the impact of rape myths. The report notes: "if strangers were arrested, prosecutors were much more likely to support their cases going to trial than with any other relationship group. In contrast, despite South African law clearly not giving marital and intimate partners 'rights' to sexual intercourse, prosecutors generally do not take these cases to trial."[73]

The South African literature establishes that the process of attrition is multifaceted. It is not solely determined by rape myths but by a plethora of other factors unique to the South African context. Still, the rape myths play a role in intimate partner violence cases, as the RAPSSA study displays. The stereotypes not only operate among those tasked with the responsibility of enforcing justice, but women who are raped also internalise these myths and this influences how they judge the violence they have experienced.

Out of the different forms of rape, intimate partner rapes are even less likely to be reported.[74] Aside from the fact that few cases will make it from reporting stage to prosecution and completion, feminists have also raised concerns about whether the law is equipped to address intimate partner violence. Fedler argues that "domestic abuse is first and foremost a social problem and only derivatively a legal problem."[75] In spite of the fact that only a small percentage of intimate partner violence cases reach the justice system, there is room for research on how marital rape survivors interact with the justice system, and what impact rape myths do have on their experiences. Additionally, at an empirical level, there is a need to understand the functioning of discriminatory attitudes by police, prosecutors, and adjudicators that keep marital rape cases out of the justice system.

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[73] Ibid., 31.

[74]Kate Wood and Rachel Jewkes, *'Love Is a Dangerous Thing': Micro-Dynamics of Violence in Sexual Relationships of Young People in Umtata* (CERSA (Women's Health), Medical Research Council, 1998), 33, 40; Jewkes and Abrahams, "The Epidemiology of Rape." Machisa et al., *The War at Home.*

[75] Joanne Fedler, "Lawyering Domestic Violence through the Prevention of Family Violence Act 1993 - an Evaluation after a Year in Operation," *South African Law Journal* 112, no. 2 (1995): 233-34.

1.4.2.1 Locating Marital Rape in the Literature

Following the emergence of a feminist public discourse on intimate partner violence in the USA in the 1970s, ground-breaking empirical studies in the 1980s delved into the previously neglected arena of marital rape. This scholarship exposed the pervasiveness of marital rape and its highly damaging and traumatic consequences.[76] Earlier prevalence studies determined that 14% to 25% of women experienced marital rape.[77] Based on her landmark study, Russell concluded that marital rape is a "widespread and significant problem in the US."[78]

Scholars across the disciplines of law, criminology, and social psychology have augmented the foundation laid by the early studies, reshaping theoretical frameworks of intimate partner violence, documenting social prejudices, and illuminating the experiences of survivors of partner rape.[79] For example, a 2002 large-scale study by Basile determined that 34% of women had experienced marital rape or intimate partner rape.[80]

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[76] David Finkelhor and Kersti Yllö, *License to Rape: Sexual Abuse of Wives* (New York: Simon and Schuster, 1987); Irene Hanson Frieze, "Investigating the Causes and Consequences of Marital Rape," *Signs: Journal of Women in Culture and Society* 8, no. 3 (1983); Jacquelyn Campbell and Peggy Alford, "The Dark Consequences of Marital Rape," *The American Journal of Nursing* 89, no. 7 (1989); Diana Russell, *Rape in Marriage* (Bloomington: Indiana University Press, 1982); Christine Hanneke, Nancy Shields, and George McCall, "Assessing the Prevalence of Marital Rape," *Journal of Interpersonal Violence* 1, no. 3 (1986).

[77] Russell, *Rape in Marriage*.

[78] Ibid.

[79] Raquel Kennedy Bergen, *Wife Rape: Understanding the Response of Survivors and Service Providers* (Newbury Park: Sage publications 1996); Kathleen C Basile, "Prevalence of Wife Rape and Other Intimate Partner Sexual Coercion in a Nationally Representative Sample of Women," *Violence and Victims* 17, no. 5 (2002); Shannon-Lee Meyer, Dina Vivian, and Daniel O'Leary, "Men's Sexual Aggression in Marriage: Couples' Reports," *Violence Against Women* 4, no. 4 (1998); Mary Kirkwood and Dawn K Cecil, "Marital Rape: A Student Assessment of Rape Laws and the Marital Exemption," *Violence Against Women* 7, no. 11 (2001); Ruthy Lowenstein Lazar, "The Vindictive Wife: The Credibility of Complainants in Cases of Wife Rape," *Southern Califorina Review of Law & Social Justice* 25 (2015).

[80] Basile, "Prevalence of Wife Rape."

Variations in prevalence differ based on the methodologies employed and definitions of sexual violence applied, but taken as a whole the USA-based studies foreground the prevalence and hidden nature of intimate partner violence. Further they demonstrate that the institution of marriage creates damaging expectations around sex and the obligations of wives, which renders wives vulnerable to coercion.[81]

Across the breadth of academic fields, marital rape remains one of the most understudied forms of sexual violence, and the preponderance of existing studies are USA-centric.[82] Compounding the problem of the concentration of literature in the USA, the study of marital rape is generally confined to the law, psychology, public health, criminology and sociology.[83] A dearth of anthropological work has meant that "there has been little qualitative field research to shed light on how culturally shaped understandings of sexual violence are located in the global context."[84] The recent multi-disciplinary publication *Marital Rape: Consent, Marriage, and Social Change in Global Context*, makes a critical intervention as the "first account of marital rape in a cross-cultural perspective."[85] Appreciating the need for a more localised perspective of marital rape, the authors' studies "emphasize how the broader context of legal, political, economic structures and cultural norms profoundly shape the experience of sexual violence."[86]

Although they may not necessarily employ ethnographic methodology, there are local studies of marital rape outside of the USA that are equally enriching, albeit less globally identified. In countries where marital rape is still legal, as well as nations that have criminalised marital rape, scholars are engaging with questions around the law, the

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[81] Basile found that 43% of the study participants had unwanted sex because they believed it was their "duty." See ibid., 283; Bergen, *Wife Rape*.

[82] Yllö and Torres, *Marital Rape*, 2, 5.

[83] Bergen, *Wife Rape*, 223; Yllö and Torres, *Marital Rape*, 5, 11.

[84] *Marital Rape*, 11.

[85] Ibid., 10.

[86] Ibid., 5.

prevalence of intimate partner violence, and the detrimental consequences for wives' well-being.[87]

1.4.2.2 Empirical Research on Intimate Partner and Family Violence in South Africa

Empirical research is vital for shedding light on the law's limitations in stemming intra-familial and intimate partner sexual violence. South African scholarship documents how categories employed in law and public policy do not neatly map onto classifications of consent and rape within communities. The Medical Research Council has conducted some of the most impactful empirical studies in this area.[88] Although, "it is widely known that many women cross-culturally choose not to call non-consensual sex with their boyfriends and partners 'rape'," the studies detail how definitions of sexual violence and coercion are locally determined, and what both women's and men's experiences and perceptions of these norms are.[89]

The literature characterises social norms that diminish the culpability of the perpetrator and discount the harm done to the victim where there is an interpersonal

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[87] For example, Kausar Parvin et al., "Spousal Violence against Women and Help Seeking Behaviour," in *Growing Up Safe and Healthy (SAFE): Baseline report on sexual and reproductive health and rights and violence against women and girls in Dhaka slums*, ed. Ruchira Naved and Sajeda Amin (Dhaka: International Centre for Diarrhoeal Disease Research, 2012); Saptarshi Mandal, "The Impossibility of Marital Rape: Contestations around Marriage, Sex, Violence and the Law in Contemporary India," *Australian Feminist Studies* 29, no. 81 (2014); Elizabeth Archampong and Fiona Sampson, "Marital Rape in Ghana: Legal Options for Achieving State Accountability," *Canadian Journal of Women and the Law* 22, no. 2 (2010); Melanie Randall, Jennifer Koshan Koshan, and Patricia Nyaundi, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (West Sussex: Hart Publishing, 2017).

[88] For example, the iconic study which found that approximately a quarter of South African men have committed rape. See Jewkes et al., "Understanding Men's Health."

[89] Wood and Jewkes, *'Love Is a Dangerous Thing'*; Kate Wood, Helen Lambert, and Rachel Jewkes, "'Showing Roughness in a Beautiful Way': Talk About Love, Coercion, and Rape in South African Youth Sexual Culture," *Medical Anthropology Quarterly* 21, no. 3 (2007): 279; Katharine Wood, Fidelia Maforah, and Rachel Jewkes, "Sex, Violence and Constructions of Love among Xhosa Adolescents: Putting Violence on the Sexuality Education Agenda," (Tygerberg: CERSA, Medical Research Council, 1996).

relationship between the two.[90] The condoning of interpersonal violence is heightened by the inter-generational normalisation of violence within families and sexual partnerships, which girls are socialised into from a young age. As Vogelman and Eagle portrayed this South African phenomenon in 1991: "In multiple ways the ideology constructed around heterosexuality, marriage, and the family acts to conceal and mystify violence and abuse against women. Such gender ideology is absorbed at every point of socialization from birth onward, making its exposure a radical and complex process."[91] Violence thus becomes the process by which many girls and women are initiated into sex.[92]

Local studies on intra-familial violence also elucidate how the normalisation of violence within families buries and obscures victims' suffering in the name of patriarchal deference, protecting family unity and reputation to the detriment of the individual that has been sexually violated.[93] The precarious economic circumstances of victims amplify their vulnerability.[94] As marital rape is both familial and intimate partner violence, a more tangled web of obstructions works against its revelation and resolution.

1.4.2.3 South African Public Health, Law and Psychology Studies of Sexual Violence and Marriage

South African research about sexual violence in marriage mainly falls under rape prevalence studies, and studies measuring the impact of cultural (i.e. Black indigenous) views as they relate to violence in marriage. The 2003 Gauteng attrition study reported that about one in five adult women surveyed had been raped by a former or current male

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[90] Wood and Jewkes, *'Love Is a Dangerous Thing'*, 6; Kate Wood, "Contextualizing Group Rape in Post-Apartheid South Africa," *Culture, Health & Sexuality* 7, no. 4 (2005): 313.

[91] Lloyd Vogelman and Gillian Eagle, "Overcoming Endemic Violence against Women in South Africa," *Social Justice* 18, no. 1/2 (1991): 218.

[92] Wood, Maforah, and Jewkes, "Sex, Violence and Constructions," 4-5.

[93] Alice Clarfelt and Laura Meyers, "The Impact of Gendered Economic Inequalities on Child Sexual Abuse Risk" (presentation, Strategies to Overcome Poverty and Inequality: Towards Carnegie III, University of Cape Town, September 2012), 16-19.

[94] Smythe, *Rape Unresolved*, 199; Clarfelt and Meyers, "The Impact of Gendered Economic Inequalities on Child Sexual Abuse Risk," 16.

partner.[95] In Smythe's study, in the Western Cape cohort of cases, rape by intimate partners (boyfriends and ex-husbands) accounted for 15% of the cases, and current husbands and boyfriends accounted for 8%.[96] Under the MRC's three-province study, 7.5% of women reported that their first rape was committed by a partner, and for those raped within the previous year, partner rapes accounted for 8.8% of the reported assaults.[97] Most recently, the RAPSSA study determined that the proportions of reported intimate partner rapes ranged from 9.5% (Mpumalanga) to 20.0% (Western Cape).[98]

In terms of cultural outlooks, a nationwide Medical Research Council study measured Black and mostly rural women's perceptions of whether sexual violence in marriage is acceptable.[99] The study found a link between the payment of *lobola*[100] and acceptance of men's control over women. At the same time, it determined that there is contestation around these norms as the women surveyed held less patriarchal views than what they perceived their culture dictated.[101] In the Sonke Change Trial, one third of the men interviewed in Diepsloot reported that a wife has no right to refuse sex, and 35% believe that the payment of *lobola* grants the husband ownership of the wife.[102]

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[95] Vetten et al., "Tracking Justice."

[96] Smythe, *Rape Unresolved*, 70-71.

[97] Jewkes and Abrahams, "The Epidemiology of Rape," 1235.

[98] Machisa et al., *Rape Justice in South Africa*, 37-38.

[99] Rachel Jewkes et al., *'He Must Give Me Money, He Mustn't Beat Me': Violence against Women in Three South African Provinces* (Pretoria: CERSA (Women's Health), South African Medical Research Council, 1999), 8-9.

[100] Loosely translated as "bridewealth" but the meaning and symbolism is more complex than the simple translation conveys. In past times lobola was given in form of cattle but in modern times may be done monetarily or through the giving of certain gifts. Lobola is a central component of customary marriage; given by a man to the family of his intended bride, for purposes of compensating/thanking her family for having raised her, and creating a bond between the two families.

[101] Ibid.

[102] Sonke Gender Justice, "Findings from the Sonke Change Trial."

The literature assesses general patterns of intimate partner violence and very few of the studies exclusively enter the marital terrain. The majority of the scholarship that explicitly engages with marital rape pre-dates the passage of the PFVA in 1993 and is largely law-oriented.[103] Sharon Kottler's psychology study is one of the few dedicated empirical studies of marital sexual violence post 1993.[104] Through questionnaires and in-depth interviews with survivors of marital rape, Kottler sought to ascertain the relationship between traditional attitudes and definitions/perceptions of wife rape, both to measure survivors' awareness of the PFVA and to record their experiences of violence and survival strategies.[105]

Kottler's study tracks the complex processes by which women come to define sexual violence in marriage as rape, and also discloses the details of what wives are subjected to at the hands of their husbands. Though not exclusively a marital rape study, Boonzaier's empirical research amongst married and divorced women from Mitchell's Plain also makes known the forms of sexual violence that women suffer in their marriages.[106] In the discipline of the law, a recent article by Yebisi and Balogun looks at

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[103] Felicity Kaganas and Christina Murray, "Rape in Marriage - Conjugal Right or Criminal Wrong," *Acta Juridica* (1983); Mohamed Saleem Khan, "A Critical Examination and Evaluation of the South African Criminal Law Concerning Marital Rape in Comparison with the Approach of Other Selected Jurisdictions" (LLM diss., Faculty of Law, University of Durban-Westville, 1985); Felicity Kaganas, "Rape in Marriage: Developments in South African Law," *International and Comparative Law Quarterly* (1986); J.R.L. Milton, "Rape in Marriage and Assault in Rape," *South African Law Journal* 102 (1985); J.R.L. Milton, "Law Reform: Marital Rape," *South African Journal of Criminal Justice* 2, no. 1 (1989); Felicity Kaganas and Christina Murray, "Law Reform and the Family: The New South African Rape-in-Marriage Legislation," *Journal of Law and Society* 18, no. 3 (1991).

[104] Sharon Helen Kottler, "Wives' Subjective Definitions of and Attitudes Towards Wife Rape" (MA diss., Faculty of Psychology, UNISA, 1998).

[105] Ibid., 77.

[106] Floretta Boonzaier, "Woman Abuse: Exploring Women's Narratives of Violence and Resistence in Mitchell's Plain" (MA diss., Faculty of Psychology, University of Cape Town, 2001).

the legal framework in South Africa and briefly considers marital rape jurisprudence.[107]

1.4.2.4 Digging Deeper: Ethnographic and History Research on Culture, Violence and Marriage

The motif of "culture" appears frequently throughout this dissertation. In South African discourse, the moniker of culture is wielded as a signifier of an essentialised Blackness, in turn integrating the concepts of custom, tradition and customary law. The contribution of legal historians and socio-legal scholars such as Chanock and Mnisi Weeks dismantles many of the static, trite, and western-oriented constructions of Black "custom" and "law" that are found in official depictions of customary law.[108] The scholars emphasise the locally-negotiated nature of living customary law, which must be understood from the perspectives of insiders. Their work coincides with theory on culturalism, which denotes the manner of demarcating the boundaries of culture as inflexible, inherent and unchanging.[109] Culturalism is generally applied to marginalised populations, those who are non-white, or members of underprivileged communities.[110]

In line with the critiques of rigid portrayals of the "other," an array of scholars representing divergent disciplines including anthropology, history and law, have called attention to the superficial and scandalised discourses on coercive marriage practices on

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[107] Oyebanke Yebisi and Victoria Balogun, "Marital Rape: A Tale of Two Legal Systems.," *Obiter* 38, no. 3 (2017).

[108] Sindiso Mnisi Weeks, "The Interface between Living Customary Law(s) of Succession and South African State Law" (DPhil diss., Law, University of Oxford, 2010); Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985); Martin Chanock, "Law, State and Culture: Thinking About Customary Law after Apartheid," *Acta Juridica* (1991); Sindiso Mnisi Weeks, *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa* (Oxford, New York: Routledge, 2017).

[109] Sherene Razack, "Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages," *Feminist legal studies* 12, no. 2 (2004); Leti Volpp, "Blaming Culture for Bad Behavior," *Yale Journal of Law & the Humanities* 12 (2000); Don Mitchell, "There's No Such Thing as Culture: Towards a Reconceptualization of the Idea of Culture in Geography," *Transactions of the Institute of British Geographers* (1995).

[110] Ibid.

the continent.[111] They propose locally-grounded and multifaceted surveys of forced marriages that provide a richer understanding of the meanings and nature of coercive marriage practices, and that uncover continuities in manifestations of VAWG.[112]

The frameworks established by scholars who critique simplistic research on culture create a platform for probing contemporary discourse on abduction marriages in South Africa, a phenomenon mainly located in rural Black communities. Over the past decade, legal scholarship and jurisprudence on *ukuthwala* has followed an almost uniform script in assessing the cultural legitimacy of violent forms of the practice. The landmark Western Cape High Court Case *Jezile v the State and Others* represents the prevailing legal standpoint on *ukuthwala*.[113]

The appellant Mvumeleni Jezile had *thwala*-ed 14-year old Nolutho Yekiso with the sanction of the male elders of both families. He transported Yekiso from the Eastern Cape to Cape Town where he kept her in confinement in his brother's house, raped and assaulted her. The Western Cape High Court declared that the *ukuthwala* practiced by Jezile and his community was "aberrant" and affirmed the 22-year sentence handed down by the trial court against Jezile for rape, assault and human trafficking. With little divergence, South African legal scholarship reinforces the conclusion that the rape and kidnapping are both violative of authentic customary law.[114]

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[111] Annie Bunting, Benjamin Lawrance, and Richard Roberts, *Marriage by Force?: Contestation over Consent and Coercion in Africa* (Athens: Ohio University Press, 2016), 29.

[112] Ibid., 2, 29.

[113] *Jezile v S and Others* (A 127/2014) 2015 ZAWCHC.

[114] Chelete Monyane, "Is Ukuthwala Another Form of 'Forced Marriage'?," *South African Review of Sociology* 44, no. 3 (2013); Marcel van der Watt and Michelle Ovens, "Contextualizing the Practice of Ukuthwala within South Africa," *Child Abuse Research in South Africa* 13, no. 1 (2012); Lea Mwambene and Julia Sloth-Nielsen, "Benign Accommodation? Ukuthwala, 'Forced Marriage' and the South African Children's Act," *African Human Rights Law Journal* 11, no. 1 (2011); Digby Koyana and Jan Bekker, "The Indomitable Ukuthwala Custom," *De Jure* 40 (2007); Hlako Choma, "Ukuthwala Custom in South Africa: A Constitutional Test," *US-China Law Review* 8 (2011); Newman Wadesango, Symphorosa Rembe, and

In juxtaposition to the formulaic legal analyses of *ukuthwala*, researchers engaging with *ukuthwala* through historical sources and ethnographic methods are shifting the discourse on the practice. Thornberry's research unearths the long history of contestation around the practice of *ukuthwala*, and the conceptual link between marriage and non-consensual sex.[115] Long-term fieldwork conducted in Eastern Cape by Rice, Smit and Wood also insert greater dimension into the debates on *ukuthwala*, confirming that the coercive aspects of the practice are not in fact anomalous in some communities.[116] Nkosi and Wasserman's archival research displays the incredible diversity in the practice in KwaZulu-Natal.[117] In an earlier piece on *ukuthwala*, Mfono shares perspectives on ukuthwala cases based on her work as a youth worker in the Eastern Cape in the early 1990s.[118] Taking a refreshingly divergent path from the legal literature, legal scholars Kruuse and Mwambene have newly examined *ukuthwala* by interviewing members of

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Owence Chabaya, "Violation of Women's Rights by Harmful Traditional Practices," *The Anthropologist* 13, no. 2 (2011); John Cantius Mubangizi, "A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions," *Journal of International Women's Studies* 13, no. 3 (2012); Diana Mabasa, "Ukuthwala: Is it all Culturally Relative?," *De Rebus* 2015, no. 555 (2015).

[115] Elizabeth Thornberry, "Colonialism and Consent: Rape in South Africa's Eastern Cape, 1847-1902" (PhD diss., Department of History, Stanford University, 2011), 114-15, 256-57; Elizabeth Thornberry, "Ukuthwala, Forced Marriage, and the Idea of Custom in South Africa's Eastern Cape," in *Marriage by Force?: Contestation over Consent and Coercion in Africa*, ed. Annie Bunting, Benjamin Lawrance, and Richard Roberts (Athens: Ohio University Press, 2016).

[116] W.J. Smit and Catrien Notermans, "Surviving Change by Changing Violently: Ukuthwala in South Africa's Eastern Cape Province," *Anthropology Southern Africa* 38, no. 1-2 (2015); Kate Rice, "Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation About Gender, Rights and Generational Authority among the Xhosa," *Journal of Southern African Studies* 40, no. 2 (2014); Wood, "Contextualizing Group Rape."

[117] Makho Nkosi and Johan Wassermann, "A History of the Practice of Ukuthwala in the Natal/Kwazulu-Natal Region up to 1994," *New Contree* 70 (2014).

[118] Zanele Mfono, "The Custom of Bride Abduction Holds Its Own against Time," *Agenda* 45 (2000).

Jezile's community in the wake of the Western Cape High Court decision.[119] They document the disjuncture between the legalistic framing and the community's rationales for violent forms of *ukuthwala*.[120]

Recent historical and ethnographic work also conveys insider perspectives of marital violence. Thornberry's research clarifies that "the concept of marital rape would not have made sense to residents of precolonial Xhosaland, nor did it form a part of the ideas about custom that circulated in the early colonial era."[121] Connected to traditional marriages, the payment of *lobola* regularly features in local views of custom, marriage and sexual violence. Through extensive ethnographic work in the township of Mpophomeni, KwaZulu-Natal, Singleton's work clearly depicts that, despite exposure to a human rights discourse of gender rights, *lobola* is perceived as nullifying a woman's right to say no to sex with her husband, rendering rape in marriage an impossibility.[122]

The South African public health, ethnographic and socio-legal studies compellingly portray the discord between statutory definitions of sexual violence and local norms around sexual violence. The literature also signals the need to push the bounds of the empirical research in new directions. Kottler, Boonzaier and Singleton's projects provide a base for accessing women's experiences of marital rape and their perspectives of sexual violence in marriage. In conjunction, there is a burgeoning of empirical research on *ukuthwala* outside of the rule-oriented legal sphere. The findings of scholars such as Rice, Thornberry, Wood, and Kruuse and Mwambene, confirm that communities justify

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[119] Lea Mwambene and Helen Kruuse, "The Thin Edge of the Wedge: Ukuthwala, Alienation and Consent," *South African Journal on Human Rights* 33, no. 1 (2017).

[120] Ibid.

[121] Thornberry, "Colonialism and Consent," 63.

[122] Judith Singleton, "The South African Sexual Offences Act and Local Meanings of Coercion and Consent in Kwazulu Natal: Universal Human Rights?," *African Studies Review* 55, no. 2 (2012): 67; Judith Singleton, "Marital Rape and the Law: The Condition of Black Township Women in South Africa's Democracy," in *Marital Rape: Consent, Marriage, and Social Change in Global Context*, ed. Kersti Yllö and M Gabriela Torres (Oxford; New York: Oxford University Press, 2016).

the sexual violence of *ukuthwala* through the paradigm of marriage. Notwithstanding the contributions of these studies, there is an absence of research that looks at the experiences of marital rape survivors and incorporates the subject of *ukuthwala* within its ambit. As such, the current empirical literature on sexual violence in marriage is minimal and disconnected.

1.4.3 Implications for Help-seeking Behaviour

The public health, attrition and ethnographic studies that I have cited thus far begin to illuminate the complexity of women's responses to intimate partner sexual violence, given familial/communal obligations and pressures, and structural constraints. The diverse limitations imposed on them in turn complicate their help-seeking behaviour. Comparatively, there are important studies that look at the "what" of the help-seeking behaviour of marital rape victims and survivors of intimate partner violence, statistically assessing trends amongst study participants, for example documenting their engagement with family, friends, police, therapists, social support resources, church and health practitioners.[123] Interview-based research by social scientists also provide rich descriptive information about how women have dealt with sexual violence in the home.[124]

In tandem, studies are increasingly developing context-based frameworks for documenting help-seeking patterns. The earlier work on intimate partner violence from the 1970s onwards myopically concerned itself with victim and perpetrator traits.[125] This approach "rendered invisible the larger socio-cultural context in which IPV occurs, and implicitly conceptualized violence as stemming from individual pathology or deviance,

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[123] For example, Parvin et al., "Spousal Violence against Women and Help Seeking Behaviour."; Jewkes et al., "He Must Give."; Lana Stermac, Giannetta del Bove, and Mary Addison, "Violence, Injury, and Presentation Patterns in Spousal Sexual Assaults," *Violence Against Women* 7, no. 11 (2001).

[124] Russell, *Rape in Marriage*; Bergen, *Wife Rape*; Kottler, "Wives' Subjective Definitions."; Frieze, "Investigating the Causes."

[125] Liang et al., "A Theoretical Framework," 71; Mary Koss et al., *No Safe Haven: Male Violence against Women at Home, at Work, and in the Community* (Washington, DC: American Psychological Association, 1994).

ignoring the important ways that violence is embedded within social contexts and cultures."[126] A subset of studies has embraced an ecological approach in looking at how survivors seek recourse and how they interface with social support structures.[127]

Scholars have moved toward analysing the "how" of women's recourse-seeking, as opposed to foregrounding the "what" (what women do in finding support, especially within formal structures).[128] As Liang et al. expound, studies of the what "limit our understanding of the processes of problem definition and how these processes may lead to or inhibit a broad range of types of help-seeking behaviour."[129] It is in seeking to understand the processes of women's recourse-seeking journeys that the factors of economics, culture, and familial and community relationships all become key considerations. The creative assessments of survivors' behaviour expand the established three stages of help-seeking (acknowledging and defining the problem, taking the decision to get help, and choosing a source of help).[130]

From the context-based literature on help-seeking, one gleans a range of barriers to survivors' efforts. The barriers encompass: wives' lack of awareness about marital rape; reluctance to report; fear of retaliation from the husband; the severity of the abuse; police unresponsiveness after reporting; blame placed on the wives; the absence of family and community support; and fear of not being believed.[131] The literature also sheds light on

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[126] Liang et al., "A Theoretical Framework."

[127] Ibid.

[128] Ibid., 74.

[129] Ibid.

[130] Ana Mari Cauce et al., "Cultural and Contextual Influences in Mental Health Help Seeking: A Focus on Ethnic Minority Youth," *Journal of Consulting and Clinical Psychology* 70, no. 1 (2002); Jeanne Fox et al., "Barriers to Help Seeking for Mental Disorders in a Rural Impoverished Population," *Community Mental Health Journal* 37, no. 5 (2001).

[131] Ibid.

the forms of support that have proved successful for ending the marital rape, for example assistance provided by social services organisations.[132]

Although not concerned with help-seeking per se, research by anthropologists in South Africa documents the personal and structural factors that shape the decisions that women take. Cultural, familial, economic and social imperatives make it more difficult for survivors to define the abuse they suffer as rape and to subsequently seek meaningful redress.[133] This is the case across the spectrum of marriage-like relationships in South Africa, including traditional unions concluded through *ukuthwala*.[134] Even though marital rape has been criminalised, going to the police may be one of the last options employed or considered by survivors of marital rape; and even if a case is filed it is very difficult for victims to see the case through.[135]

The factors that fuel sexual violence in marriage in South Africa and restrict women's searches for recourse symbolise how marital rape is a "multifaceted phenomenon grounded in the interplay of individual, family, community and socio-cultural factors."[136] Consequently ecological frameworks of violence are well-suited to evaluations of survivors' help-seeking behaviour. Following Belsky's research on child sexual abuse, Heise proposed the application of an ecological framework for conceptualising the etiology of violence against women.[137] Belsky's framework contains four levels of influence: 1) the individuals' personal history factors (childhood exposure to violence, damaging parenting

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[132] Lee Harrington Bowker, *Beating Wife-Beating* (Lexington: Lexington Books 1983).

[133] Singleton, "Marital Rape and the Law."; "The South African Sexual Offences Act."; Kottler, "Wives' Subjective Definitions."

[134] Rice, "Ukuthwala in Rural South Africa."; Wood, "Contextualizing Group Rape."

[135] Rice, "Ukuthwala in Rural South Africa," 396; Jewkes and Abrahams, "The Epidemiology of Rape"; Smythe, *Rape Unresolved*, 194-99.

[136] Lori Heise, "Violence against Women: An Integrated, Ecological Framework," *Violence Against Women* 4, no. 3 (1998): 263-64.

[137] Ibid.; Jay Belsky, "Child Maltreatment: An Ecological Integration," *American psychologist* 35, no. 4 (1980).

models); 2) immediate factors in which the abuse happens, such as family and intimate relationships (microsystem); 3) the exosystem, consisting of formal and informal institutions, for example work, neighbourhood, social structures, and identity groups; and lastly 4) the macrosystem, representing general views and attitudes that permeate culture at large.[138]

Refining Belsky's framework, Edleson and Tolman conceived of the mesosystem, which refers to the connections between an individual's microsystem and social institutions such as police, courts and social service institutions[139] It has been noted that the mesosystem is the most significant layer in the ecological framework as it "describes the cumulative interaction of all of the other levels upon a person."[140]

The five layers of the ecological framework can be applied to systematically probe the multiple determinants of women's help-seeking behaviour. The model encompasses a survivors' individual circumstances and perspectives, in addition to the formal and informal institutions that she relates to in seeking recourse. The mesosystem represents the interaction between the layers, and exhibits how they mould women's help-seeking journeys. As a whole, the ecological framework has the ability to fashion a dynamic picture of societal norms concerning marital rape, and how these norms impact women's lives.

In South Africa, there are few studies that intimately investigate what women do over the short and long term to alleviate the sexual abuse in their marriages. Kottler's interviews with survivors present evocative anecdotes but mainly concentrates on wives' experiences of rape and how they conceive of the violence. Rice's ethnography touches upon the limited options available for *ukuthwala* survivors. To expand the literature base, further research on how women go about restoring some measure of dignity in their lives

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[138] Belsky, "Child Maltreatment," 322-30., Heise, "Violence against Women," 265.

[139] Jeffrey Edleson and Richard Tolman, *Intervention for Men Who Batter: An Ecological Approach* (Thousand Oaks: Sage Publications, 1992), Chapter 6.

[140] Molly Dragiewicz, *Equality with a Vengeance: Men's Rights Groups, Battered Women, and Antifeminist Backlash* (Boston: Northeastern University Press, 2011), 20.

after, or even during, episodes of marital rape, is critical. There is a need to evaluate marital rape survivors' help-seeking processes through an ecological paradigm to illustrate the interaction between the multiple societal layers in which women are embedded; and to discover the recourse forms that result in sustainable and positive change in survivors' lives.

1.5 Significance of the Study

The extant literature concerning marital rape clarifies why it is one of the most complicated, prevalent and obscured forms of sexual violence. Despite the widespread nature of sexual violence in marriage, the subject retains only a marginal place in the larger literature on sexual violence against women. This is maybe because marital rape is such a private and emotive form of violence, as well as the fact that survivors' own social conditioning and influences prevent them from seeing the sexual harm in their marriage as rape.

In South Africa, the paucity of dedicated research on marital rape is stark and disconcerting. There is importance in the research of intimate partner violence, and there are commonalities along the spectrum of relationships that fall under the "intimate partner" category. Nonetheless, marital rape is a distinctive form of sexual violence against women because it rests upon institutional premises grounded in legal history, and social and cultural norms. Apart from the ethnographic and empirical contributions by Rice, Singleton, Boonzaier and Kottler, the existing scholarship only touches upon societal attitudes to sexual violence in marriages (for example by measuring opinions on *lobola* and husbands' sexual entitlement), and moreover it tends to place marital rape within the broader ambit of intimate partner violence.

Notwithstanding the distinctive nature of marital rape, since the demise of the marital rape exemption, studies about the law's response to martial rape are for the most part non-existent. It cannot be taken for granted that the legislative reform buried the prejudices against women and marital rape, for the lives of patriarchy and rape stereotypes

are long and healthy, even in the face of legislative and jurisprudential progress and a growing human rights consciousness.

We know little about the trajectories of marital rape victim's recourse-seeking journeys in contemporary South Africa, nor how institutions such as the courts, police, policymakers, family, and churches respond to marital rape. The empirical studies on *ukuthwala* and marital rape serve as a resource for grasping the restrictions wives are bound by, and the social and cultural drivers of sexual violence in marriage. In spite of this value, what is missing from the present studies is a holistic and inter-disciplinary assessment of sexual violence in marriage that pulls together and extends the distinct strands scattered across the existing bodies of literature on violence against women.

Applying a Black and African-oriented feminist theoretical framework that pays particular attention to Black women's realities, my research makes known the layered and interlocking forces that continue to reinforce the notion that rape within marriage is an impossibility. Addressing the gap in research on marital rape in South Africa, my research contributes knowledge about the ways in which modern state and other institutional bodies relate to this contested and concealed form of violence in the democratic era. In spite of the plethora of women-centred laws and constitutional guarantees, I document how both subtle and overt structures still deprive women of their bodily autonomy, in effect perpetuating the long-held norm that wives' bodies are not their own. Importantly, I interject a unique perspective of the *ukuthwala* violence, placing it within the marital rape continuum.

An equally, if not more significant contribution of this research is the revelation of individual experiences of marital rape survivors and their help-seeking trajectories over time. Though it implicates the workings of state structures, my dissertation positions women at the centre of its inquiry and is ultimately concerned with discovering their journeys, struggles and awakenings. It draws heavily from the perspectives of community workers in the Eastern Cape and Western Cape, who have extensive expertise in aiding and counselling marital rape survivors, and the life histories of marital rape survivors themselves. Addressing the lack of research on women's journeys in seeking help for

marital rape across institutional layers, my research unveils the meandering, non-linear, and frequently fraught processes through which women realise that they are deserving of living without sexual abuse, and how they take steps to find solace.

1.6 Outlining The Research Sub-Questions

The central research question of this dissertation asks: Since the criminalisation of marital rape in 1993, in what ways is marital rape in South Africa rendered (in)visible in and through the institutions where women seek protection from violence? Applying an ecological and interpretive analysis of institutional responses to marital rape and women's experiences, I ask a series of sub-questions that highlight the different layers of institutions that are relevant to marital rape survivors', from the level of the state to local, cultural and individual spheres. The sub-questions are as follows:

1. Prior to and post-1993, how have ostensibly progressive legal and policy developments contributed to a disavowal of marital rape?
2. How does contemporary South African legal discourse reinforce the myth that marital rape is a lesser form of rape?
3. In the case of *ukuthwala*, how does institutional culturalism obscure the link between sexual violence and marriage?
4. In what ways do individual and local contexts hinder women's ability to seek recourse for marital rape?
5. In the face of silence surrounding sexual violence in marriage, what forms of recourse do women draw upon that positively impact their lives?

1.7 Overview of Chapters

Chapter 2 outlines the theoretical foundations of the methodology employed for my research as well as a description of my research process. I also discuss the ethical implications of my research. The five sub-questions presented above are consecutively addressed in Chapters 3 through 7. In Chapter 3, I ask the question: *Prior to and post-1993,*

how have ostensibly progressive legal and policy developments contributed to a disavowal of marital rape? The purpose of this chapter is to provide a historical grounding for the research. Through a critical examination of jurisprudence and legislative reform processes from the 1980s through the 2000s, I document how state actors exhibited ambivalence towards marital rape, and failed to tackle the theoretical and practical vestiges of the marital rape exemption. As the state slowly moved towards providing greater protections for women in the 1980s and into the early 1990s, it retained an affinity for protecting the husband and family at the expense of wives. I demonstrate that the eventual criminalisation of marital rape in 1993 under the PFVA was a political manoeuver that placed women's voices and concerns at the periphery. A human rights consciousness gripped South Africa with the advent of democracy, engendering more women-oriented legislative reform with direct feminist inputs. Still, marital rape remained a tangential matter even with the enactment of the Domestic Violence Act (DVA), which replaced the PFVA in 1998.

In Chapter 4, I move into the present period, still staying within the law. The question that this chapter grapples with is: *How does contemporary South African legal discourse reinforce the myth that marital rape is a lesser form of rape?* I dissect the discourse of three post-PFVA marital rape judgements to reveal the continuity of the rape myths in the sentencing determinations made by courts. Relying upon social psychology, sociology and criminology literature on the function of rape myths and rape legitimising language, I illustrate how judges employ neutralisation techniques in their reasoning in order to diminish the culpability of the husbands. I assess feminist responses to rape jurisprudence following the enactment of minimum sentences legislation in 1997, and how their advocacy influenced the 2007 Amendment to the sentencing legislation.

The fifth chapter asks: *In the case of* ukuthwala*, how does institutional culturalism obscure the link between sexual violence and marriage?* Building upon my prior research on *ukuthwala*, in this chapter I make the argument that institutional responses to *ukuthwala* have had the effect of invisibilising marital rape, thus restricting the impact of advocacy interventions. I contend that the approaches of policymakers, civil society groups, the justice system and legal scholars, is characterised by culturalism. Culturalism refers to static and essentialised modes of understanding culture that cultivate and perpetuate incomplete truths about

certain populations. Through a romanticised discourse, institutions have largely rejected sexually coercive forms of *ukuthwala* as authentic forms of cultural expression. The discourse constructs violent *ukuthwala* – and the rapes that accompany it – as insular and aberrant acts, unconnected to broader gendered dynamics in marriage. I propound that the institutional failure to embrace a more fluid understanding of living custom eclipses the fact that marriage is habitually and widely employed to validate sexual violence against women.

Chapters 6, 7 and 8 present my fieldwork findings. Chapter 6 asks: *In what ways do individual and local contexts hinder women's ability to seek recourse for marital rape?* Drawing from my empirical research, this chapter documents the multitude of factors that obstruct women's recourse-seeking efforts in the context of marital rape. My aim here is to exhibit that, for women, the process of obtaining help is very uncertain and non-linear, as the majority of survivors who approach NPOs for assistance are not aware that sexual violence in marriage is a violation of their rights. This stems from the cultural and social norms that women assimilate from their families and communal surroundings. I uncover a set of cultural and social norms that exist within marriages, families, churches and local justice structures that impede women's ability to define and protect their sexual autonomy, and to seek redress when abused. I detail how, with the assistance and guidance of NPO court and social auxiliary workers, women are gradually able to find different tools to frame their experiences and aspirations in a way that emphasises their well-being and safety.

Despite myriad challenges, some women are able to successfully draw from their local institutions to obtain relief from sexual and other forms of violence within their marriages. Thus, the question guiding Chapter 7 is: *In the face of silence surrounding sexual violence in marriage, what forms of recourse do women draw upon that positively impact their lives?* The goal of this chapter is to describe the forms of relief that resonated out of my research with community non-profit organisations (NPOs). In doing so, I relay how the state justice system sometimes does positively impact women's lives, but this is mainly due to the continuing advocacy and support of local women's rights organisations that incessantly push for state actors to protect women. Additionally, in this chapter I highlight the subtle means through which women obtain support and take ownership of their destinies

through the assistance of local NPOs – for example attending community workshops, going for long-term counselling, and building a stronger self-esteem.

In Chapter 8, I integrate the life histories of two survivors of coercive *ukuthwala* whom I interviewed. Their accounts weave together the concepts of marital rape, institutional responses and help-seeking. The life stories represent a long view of how women cope with the violence of *ukuthwala* and the constraints of marriage across decades, and the steps they take to improve their circumstances. In Chapter 9, the denouement of the dissertation, I reflect on my own journey in conducting the research for this dissertation, and tease out the most important phenomena of each chapter and from the thesis as a whole.

2 Chapter 2: Methodology and Ethics

2.1 Introducing the Methodology and Theoretical Orientation

When I began to conceive of the research scope for my dissertation, the two certainties I possessed were that the thesis must concern marital rape, and it must centre women's lived experiences of this form of violence. I looked at literature on marital rape, jurisprudence, and policy documents, and noted, much to my frustration, that the subject of marital rape did not feature prominently in these resources.

Scholarship has established that violence against women and girls (VAWG) occurring in intimate settings is the form of violence that is least likely to be disclosed.[141] It has also indicated that such violence is prevalent.[142] That marital rape is hidden and has been socially, legally and culturally condoned, is precisely the reason for which research about marital rape is so critical. To shy away from understanding such an involute phenomenon is to risk buttressing the very societal norms that have nullified women's autonomy over their bodies.

With these motivations in mind, my dissertation begins to address the deficiency of research on marital rape on South Africa by exploring formal and informal institutional responses to marital rape, in the context of survivors' help-seeking journeys. Using an interpretivist research paradigm, the dissertation uncovers how institutions conceptually discredit marital rape as a recourse-worthy form of abuse, which in turn obfuscates survivors' attempts to find help. Alongside the theme of erasure, I detail how marital rape is acknowledged, and how some survivors find relief.

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[141] Fedler, "Lawyering Domestic Violence."; Jewkes and Abrahams, "The Epidemiology of Rape."

[142] Basile, "Prevalence of Wife Rape."; Russell, *Rape in Marriage*.

My research question asks: Since the criminalisation of marital rape in 1993, in what ways is marital rape in South Africa rendered (in)visible in and through the institutions where women seek protection from violence? This is an open-ended research question, informed by five sub-questions that probe both macro and micro-level themes of the erasure and discovery of marital rape. My analyses are underpinned by feminist theory, with emphasis on Black and African feminism(s) which call attention to overlapping forms of oppression within Black and African women's lives.

The practice of feminism within the academic space is designed to question and disturb the status quo.[143] It drives those who believe in the feminist project to look at their immediate world and to ask what certain phenomena say about women's lives. Feminist theory, in its myriad forms, is ultimately concerned with the agency of women and fostering a more gender equal society. Scholars and practitioners must therefore do the work of transmitting understandings of women's lives through rich descriptions, and excavating meaning from the palpable silences that still surround their realities.[144]

The questions that I ask in my research connect a range of motifs, for example cultural norms, institutional values and modalities, and survivors' experiences of marital rape and help-seeking. In light of the open-ended and exploratory nature of my research questions, the sensitivity of my research subject, and my feminist positioning, I decided that I could not rely upon written resources alone. I had to go into the field and talk to women. My dissertation is therefore the product of qualitative research methodology. Qualitative methodologies allow for creativity and expansiveness in researching phenomena, stress inside perspectives, and are able to generate intricately descriptive data, also known as "thick descriptions."[145]

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[143] van der Spuy and Clowes, "Review: Accidental Feminists?," 213; Mama, "Women's Studies and Studies of Women in Africa During the 1990s," 2.

[144] Gqola, "Cult of Femininity."; Motsemme, "The Mute Always Speak."

[145] Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Cultural Geography Reader*, ed. Timothy Oakes and Patricia Price (London: Routledge, 2008); Rachel Ormston

As non-quantitative methodology extracts data with more depth and dimension, in respect of the study of violence, these exploratory tools "provide greater insight into motivation, meanings, and dynamics of violent relationships."[146] The studies that contribute most significantly to my research are those which shed light on how women conceptualise and respond to sexual violence. These studies all rely on qualitative methods such as in-depth interviews and immersion in communities.[147]

Among the range of potential qualitative paradigms, my methods are rooted in the interpretivist tradition of research which "seeks to understand people's lived experience from the perspective of people themselves."[148] Conducting my fieldwork through the context-oriented lens of interpretivism allowed for a richer and more elaborate understanding of the cultural, legal and socioeconomic underpinnings of responses to marital rape by state institutions, community organisations and women themselves. I did not go into the field knowing exactly what I would find, but as I continued I realised the importance of allowing interesting questions to emerge, and absorbing the unique perspectives of each woman I interviewed.

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et al., "The Foundations of Qualitative Research," in *Qualitative Research Practice: A Guide for Social Science Students and Researchers*, ed. Jane Ritchie, et al. (Thousand Oaks: Sage Publications, 2014), 4; Robert Elliott and Ladislav Timulak, "Descriptive and Interpretive Approaches to Qualitative Research," in *A Handbook of Research Methods for Clinical and Health Psychology*, ed. Jeremy Miles and Paul Gilbert (Oxford: Oxford University Press, 2005), 147. Chris Barker and Nancy Pistrang, *Research Methods in Clinical Psychology: An Introduction for Students and Practitioners* (West Sussex: John Wiley & Sons, 2015), 73.

[146] Mary Ellsberg and Lori Heise, "Researching Violence against Women: A Practical Guide for Researchers and Activists," (Geneva: World Health Organisation, 2005), 73.

[147] Rice, "Ukuthwala in Rural South Africa."; Singleton, "The South African Sexual Offences Act."; Rice, "Marital Rape and the Law."; Kottler, "Wives' Subjective Definitions."

[148] Monique Hennink, Inge Hutter, and Ajay Bailey, *Qualitative Research Methods* (London: Sage Publications, 2011), 14.

2.2 Reflexivity

Qualitative and feminist methodologies also encourage reflexivity on the part of researchers – the act of reflecting upon one's positioning and interactions with research participants.[149] As Angen poignantly articulated, as researchers "(w)e cannot step outside of our intersubjective involvement with the lifeworld and into some mythical, all-knowing, and neutral standpoint… By our very being in the world, we are already morally implicated."[150]

I commenced my research journey aware of the fact that I am a staunch feminist, that I have been studying violence against women for many years, and that I do have connections within the women's rights activist and academic community in South Africa. It is my background as a feminist researcher of violence against women in South Africa that motivated me to research and write this dissertation. I also take stock of how my identity a Black African feminist woman shapes my perspectives in my research. I am extremely sensitive to women's experiences, concerned with the empowerment of women, and passionate about learning women's stories. At the same time, in many respects I am an outsider. I have lived most of my life in the United States, am non-South African, and I also possess an inordinate amount of education from institutions of privilege.

Building trust between myself and my research participants was helped by the fact that the leadership of the non-profit organisations (NPOs), Masimanyane and Mosaic, welcomed me with open arms and arranged for me to speak to staff. I am fortunate in that in my time at the University of Cape Town (UCT) I have come to be supervised and mentored by scholars who have healthy and longstanding relationships with the South

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[149]Emily Bishop and Marie Shepherd, "Ethical Reflections: Examining Reflexivity through the Narrative Paradigm," *Qualitative health research* 21, no. 9 (2011): 1283; Ormston et al., "The Foundations of Qualitative Research," 4.

[150] Maureen Jane Angen, "Evaluating Interpretive Inquiry: Reviewing the Validity Debate and Opening the Dialogue," *Qualitative health research* 10, no. 3 (2000): 383.

African women's rights community. My access to Masimanyane and Mosaic would not have been possible without my support system at UCT.

Some interviews were characterised by ease, while in others I could see that the participants were wary of me, wondering where I had come from, and what exactly I was doing there. Where I could sense that my interviewee was uncomfortable, I endeavoured to build trust by speaking more about my work within South Africa and naming persons whom we both knew well. Many a time, when I mentioned so-and-so, an interviewee would light up and exclaim: "Ah! You know her?! I have known her for years. I love her!" They would then launch into stories about their work with the individual(s) over the years and their positive relationship. As I went along I became more cognisant of the fact that it was important that I not only introduce my research project and institutional affiliation, but also present information about how I fit within the South African women's rights community. Otherwise I appeared as a person without context; an outsider.

2.3 Desktop Research

The nature of my research topic required that I not rely too heavily upon any one particular field. Beginning in early 2016, I consulted a range of existing sources within the fields of law, public health, anthropology, sociology and psychology that contain qualitative and quantitative data about marital rape in comparative and local contexts. This was so that I was able to build a solid theoretical understanding of the history of legal and policy reactions to marital rape, continuing feminist efforts around sexual violence, intimate partner violence, socio-cultural conceptions of sexual violence in marriage, and the manner in which women strive to express agency.

I conducted my literature review with attention to feminist theorising and women-centred empirical work, concentrating upon research that consciously broadens and stretches understandings of VAWG; critiques and assesses state engagement with the problem of VAWG; and, most importantly gives greater voice to survivors themselves. Studies based on large-scale surveys were pivotal for outlining general patterns in terms of the South Africa's protection of women, and women's engagement with the criminal

justice system vis-à-vis rape. Much of this literature is attributed to the South African Medical Research Council's Gender and Health Research Unit, and its partners.[151] Incorporating their work and the studies of other scholars, I placed emphasis on community-based ethnographic studies as they offer a localised and embedded perspective of intimate partner sexual violence.

I located survey and ethnographic studies by conducting searches in relevant databases using keywords such as: *marriage, marital, rape, sexual violence, gender-based violence, culture, abduction, women, masculinity, criminal, justice, law, local, custom, tradition, attitudes, ukuthwala, and coercion.* Many resources were retrieved from the bibliographies of the articles and books that I initially perused. I also incorporated reports by South African civil society organisations such as the Tshwaranang Legal Advocacy Centre to end violence against women.

For the law and policy resources, I looked at the evolution of common law and statutory law concerning marital rape, the rights of wives in marriage, and sexual offences. I relied on materials retrievable through the university library system and on the internet – including case law, commission reports, parliamentary reports, and journal articles. Pre-1993, I appraised court appeals on the issue of marital rape and legal treatises to trace the integration of the marital rape exemption into South African law. I also searched for cases in the period after the criminalisation of marital rape by the Prevention of Family Violence Act (PFVA) towards the end of 1993. Generally, I found case law using the Westlaw and LexisNexis legal databases. For unreported cases, the Southern African Legal Information Institute website, http://www.saflii.org, was a useful repository. It was important to dissect the *dicta* and reasoning of cases across time periods in order to ascertain continuities and shifts in legal discourse on sexual violence in marriage and the position of wives. I was only able to access reported judgments, meaning cases appealed from the Magistrate's Courts.

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[151] Machisa et al., *Rape Justice in South Africa*; Machisa et al., *The War at Home*; Jewkes et al., "Understanding Men's Health."; Jewkes et al., "He Must Give."

Post-1993 the universe of cases I identified is small, comprising six decisions.[152]

The *Jezile* decision, which is the highest court decision on the practice of *ukuthwala*, is not framed as a marital rape case, but as I am making the argument for expanding understandings of marital rape, *Jezile* is significant.[153] Further, I obtained access to the *Jezile* trial transcripts. The case record is a mine of information about localised conceptions of the violent practice of *ukuthwala* and how that contrasts with the voices representing the state and civil society, i.e. the judges, prosecutors, and NPOs.

In addition to case law, I perused government documents concerning violence against women in marriage to ascertain the trajectory of state discourse on marital rape. Of greatest value are the reports of the South African Law Reform Commission (previously known as the South African Law Commission) including the 1985 report entitled *Women and Sexual Offences in South Africa,*[154] and its recent discussion paper on *ukuthwala.*[155]

2.4 FIELDWORK

2.4.1 Sampling Rationales: The Non-Profit Organisations

As I stated earlier in this chapter, my research questions and theoretical positioning required that I go into the field in order to talk to women. I resolved to be present in their day-to-day contexts to learn more about the neglected phenomenon of marital rape, women's recourse-seeking journeys and institutional reactions. Although I am not an ethnographer, with two interdisciplinary degrees (incorporating history, gender studies,

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[152] *Rowles v S* [2012] JOL 29414 (ECG); *W v Minister of Safety & Security & Others* [2007] JOL 20000 (E); *S v Modise* (113/06) [2007]; *S v Mvamvu* [2005] 1 All SA 435 (SCA); *S v Moipolai* (CA 53/2004) [2004]; *Sekese v S* [2009] JOL 23803 (ECM).

[153] *Jezile v S.*

[154] South African Law Commission (SALC), *Women and Sexual Offences in South Africa* (Project 45)(1985).

[155] South African Law Reform Commission (SALRC), *The Practice of Ukuthwala* (Project 138) Discussion Paper 138 (2015).

anthropology, and political science), and as a former asylum lawyer who assisted survivors of torture and gender-based violations, I felt equipped to undertake local research on the very sensitive topic of marital rape. It also helped that I have civil society connections in South Africa based on my prior work as a gender researcher and consultant. I have long been drawn to the work of anthropologists, and have absorbed literature on violence which confirms that extended and focused interactions with communities and participants is valuable for examining violence in more textured and subtle ways. Documenting the lived experiences of those who have endured marital rape or assisted survivors allows for the discovery of the "gendered ways that state institutions, healthcare systems, caregivers, and individuals themselves enable, sanction, or aim to curtail such violations."[156]

My strategy of choosing a specific grouping of research informants is illustrative of the purposeful sampling method. Such sampling is suitable where the "the study aims to depict central, important or decisive aspects of the investigated phenomenon," as it ensures that these aspects are addressed through engaging with the chosen informants.[157] The literature already demonstrates that marital rape is a largely private and peripheral issue which is difficult to measure through prevalence surveys. The studies however do not detail the modalities that render marital rape a hidden and neglected issue. By speaking with the staff of the direct-service organisations I could access repositories of knowledge and insight to learn how women experience violence in intimate settings, and what they do in response.

Masimanyane and Mosaic, provide a safe space for women survivors of violence receive to help and guidance without being judged. The NPOs directly counsel women and also have techniques for eliciting information about the forms of abuse their clients may be suffering in their relationships, including sexual abuse. The staff could speak not just to the individual experiences of clients they have assisted; they could also speak to

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[156] M. Gabriela Torres, "Reconciling Cultural Difference in the Study of Marital Rape," in *Marital Rape: Consent, Marriage, and Social Change in Global Context*, ed. Kersti Yllö and M Gabriela Torres (Oxford, New York: Oxford University Press, 2016), 13.

[157] Elliott and Timulak, "Descriptive and Interpretive Approaches to Qualitative Research," 152.

salient overarching patterns in the help-seeking behaviour of women who have survived marital rape. Moreover, the staff of these organisations are invested in their work in very poignant ways. Some of them are former clients of the organisations and others came to the organisations during life transitions, for example leaving an abusive marriage. For this reason, they have a deeper understanding of what their clients endure.

I also chose Mosaic and Masimanyane because they work in different geographical areas, and this would add a comparative component to the data. Mosaic is headquartered in Cape Town and has a presence in the Cape Town metropole and the interior of the Western Cape. The main office for Masimanyane is in East London, but its reach extends across the rural and urban areas of the Eastern Cape. The two organisations are embedded in the communities in which they work. The staff live in or close to the areas where their offices are based, and have intimate knowledge of local language(s), cultures, institutions and community ties.

2.4.2 Ethical Clearance and Fieldwork Timeframe

After obtaining ethical clearance from the UCT Law Faculty Research Ethics Committee in November 2016, I began my fieldwork with Mosaic in January 2017, which I concluded in May 2017. I conducted my fieldwork with Masimanyane in East London in April 2017. The ethical clearance parameters permitted that I interview staff who work for Masimanyane and Mosaic, as well as community members chosen by the organisations for participation in group discussions about sexual violence in marriage. For the interviewing and group discussions I drafted participant information sheets and corresponding consent forms. I also developed a question guide for the one-on-one interviews. The Research Ethics Committee approved all materials prior to my commencement of the fieldwork.

2.4.3 Description of the Sample (Study Participants)

Mosaic and Masimanyane primarily assist Black and Coloured (women of multi-racial and multi-ethnic descent) women who live in townships and informal settlements, and rural areas. In South Africa, many people move across and in-between localities, so that the concept of 'place' and place-based identity is not unchangingly fixed into

categories of rural, urban or peri-urban. There are however conditions and perspectives that are more present in particular areas, and I highlight these nuances in the empirical chapters. I collectively refer to the women who are the subjects of this study as Black. The majority of the areas the NPOs service are ravaged by crime and substance abuse. Both organisations do have clients from all race groups, of which some are middle to upper class. Some of the clients are also immigrants. Both organisations offer a range of services in their respective locales based on an integrated care model for their clients.

Certain staff are first-responders for rape victims, for example those who work in the Thuthuzela Care Centers (TCCs). The TCCs are a one-stop service facility for survivors of sexual violence. The TCCs, overseen by the National Prosecution Authority's Sexual Offences and Community Affairs (SOCA) unit, were "established to reduce secondary victimization, increase conviction rates and reduce the length of time taken to finalise sexual offence cases".[158] The TCCs provide services such as emergency medical care, HIV post-exposure prophylaxis, and counselling. In most TCCs, NPOs like Mosaic and Masimanyane are contracted to provide the counselling services, and other forms of support to survivors. They do trauma counselling, and walk the client through the process of the medical exam, and filing a case with the police.

Other staff work in-house at Magistrate's Courts and police stations – the result of carefully cultivated relationships and partnerships between the organisations and the local authorities. Where there are partnerships with the South African Police Service (SAPS) the counsellors run the Victim Empowerment Centres in the police stations.[159] Some staff are based at the organisations' regional offices where they counsel women and do advocacy work. An additional and integral part of the work done by Masimanyane and Mosaic are community workshops in urban and rural areas where they educate women

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[158] Machisa et al., *Rape Justice in South Africa*, 19.

[159] These centres are part of South Africa's Victim Empowerment Programme (VEP), a component of the National Crime Prevention Strategy launched in the late 1996. As a multi-sectoral collaboration, the VEP is designed to provide services to victims of crime, and to create a more supportive environment for them as they engage with the justice system.

and find more individuals who need assistance. About half of the NPOs staff have been with their organisations for close to two decades (15 years and above). A proportion did similar work before joining the organisations. The majority of the staff that I interviewed were drawn to this work because of their own experiences of abuse within marriage and their families.

To maintain the anonymity of the staff and their clients, in my empirical chapters I do not specify the precise office/location from which the data was obtained. I shall however list the areas that are represented in the data. For the Western Cape, interviews and observations covered Mitchell's Plain, Khayelitsha, Worcester, Wellington, Wynberg and Paarl. At Masimanyane, I conducted all interviews at the Eastern Cape office, but the staff represented offices and programs in East London and across the Eastern Cape – in both urban and rural areas. The *ukuthwala* project of Masimanyane was based in the O.R. Tambo and Amathole municipalities of the Eastern Cape.

2.4.4 Interviews

Under the guidance of the leadership of the organisations, and through direct liaising with staff, I conducted interviews with fourteen members of staff: seven from Mosaic and seven from Masimanyane. The participants were social auxiliary workers (lay counsellors), court advisors, TCC counsellors, community researchers and educators. The interviews lasted from half an hour to two hours. For Mosaic I did interviews at the locations where each staff member was based. I travelled throughout the Cape Town metropole and interior areas of the province. For Masimanyane I conducted my interviews from the organisation's main office in East London. The staff that I spoke to worked in East London and the surrounding townships, as well as in rural areas of the former Ciskei and Transkei.[160]

[160] The Ciskei and Transkei were two of the ten Black homelands (Bantustans) created by the apartheid government to strip Black South Africans of their South African citizenship and enforce race-based spatial separation. Ciskei and Transkei were designated as the homelands for isi-Xhosa speaking South Africans. Following the fall of apartheid, these Bantustans became part of the Eastern Cape province.

While I was in East London, Masimanyane arranged for me to speak with two of their clients who are survivors of the violent form of *ukuthwala*. The women travelled to East London from their homes in a rural location of the former Transkei, and then returned home after our interview. Masimanyane provided food for all of us and covered the clients' transportation costs. Given the time constraints for both the clients and the Masimanyane staff who were scheduled to speak with me that morning, we decided to do a group interview, with the Masimanyane staff providing their own perspectives on marital rape as well as acting as translators for the isiXhosa-speaking clients. These two members of staff were well acquainted with the clients as they had done work directly in their communities and had provided counselling to them. In this way, the staff helped to put the clients at ease and to explain my research to them and assist in answering questions that arose.

2.4.5 Observing

Where presented with the opportunity, I spent time at each organisation in order to observe their work, and to get a more acute sense of their structures, programs, activities and characteristics. Though I spent a shorter period of time at Masimanyane in East London, outside of the interviews, I spoke to many staff members, including their Director Dr Lesley Ann Foster, in order to learn more about the history and focus of the organisation. Given that Mosaic is local, I took advantage of being able to visit their office regularly. I attended staff meetings, had informal chats with staff, and also went on site visits with staff and interns.

2.5 Limitations of the Study

When I set upon the journey of studying marital rape in South Africa, I thought very carefully about what I wanted the study to be, and what I did not want it to be. My parameters and goals had to be clear, to allow for me to pick the best methodologies; but to do so with acute awareness of what aspects of the field I would engage with, and, as a result of that, what aspects would be excluded or less prominent. My motivation as a feminist scholar is to assist in imbuing academic, policy and other discourses with a greater understanding of what women endure; to work toward retrieving women's perspectives,

experiences and voices from environments in which they are suppressed, trivialised or unacknowledged. For a topic as emotive, obscured and under-studied as marital rape, I recognized that there was room for myriad studies to be conducted in the South African context. Therefore I initially felt pulled in many different directions, all of which were important, all of which could have made significant contributions to the study of women and marital rape.

In the end, I decided upon an exploration of the intersection between formal and informal institutions, marital rape, and recourse-seeking by women. By including an institutional lens in the framing of my research question and sub-questions, I intended to identify patterns in how marital rape is conceptualised at various levels of society, but to do so in a way that centres women. Working within an ecological paradigm facilitated a multi-faceted and dynamic reading of marital rape – providing not just a view from state entities, but also from locales in the Eastern Cape and Western cape, and from women themselves.

The most important decision I had to make was whether or not speaking to survivors of marital rape would be a central component of my research methodology. There are immense and unparalleled benefits in speaking to survivors themselves. No medium can substitute for the telling of one's own experience on one's own terms. But, I am also sensitive to the fact that marital rape is an extremely painful phenomenon for those who are subjected to, and the process of coming to terms with it, of surviving it, and of finding help if that is what one chooses – is fraught with obstacles and uncertainties.

Whether a woman will concede that she has suffered sexual abuse in her marriage is based on her own personal definitions, social conditioning, whether she has sought help, and the outcomes of her help-seeking experiences. The act of identifying ways to interview women who were at different parts of their recourse-seeking journeys (including women who did not seek help from NPOs) was, I decided, a different research project. It was a project that required immersion in the field over an extended period of time. To attempt to do this, without having adequate time, appropriate disciplinary grounding, and options for psychological support referrals, could cause immense harm to the participants.

Ultimately, I chose to interview staff who could, based on their many years of intimately assisting women survivors of violence, communicate women's experiences of violence and help-seeking over the long-term. Through their perspectives, I could learn how marital rape hides and comes to the surface. As the staff are based in or highly familiar with the areas that their clients come from, they could also share observations of the local formal and informal institutional influences on survivors' journeys.

At the same time, my research design did not exclude the possibility that the NPOs may have clients who could speak to me about their experiences of marital rape and attempts to find help. But again, for ethical purposes, and with the understanding that the NPOs main commitments are to their clients' well-being, I deferred to the NGOs to identify survivors. Consequently, the empirical component of my dissertation is based on interviews with a carefully selected group of women in the Eastern Cape and Western Cape.

Working within an interpretivist paradigm, my goal is to unearth some women's experiences by absorbing the work of two community-oriented feminist NPOs, and drawing meaning from the outlooks of the informants. By conducting in-depth interviews, I sought to find rich and complex data, and to proffer descriptions that represent in nuanced terms certain perspectives and realities of marital rape, help-seeking, and institutional positionalities. To that end, this is not a prevalence study and I do not seek to generalise my findings nor argue that they are nationally representative. The perspectives that I gathered are limited to certain regions – these being the Cape Town metropole and surrounding areas, and East London and certain rural areas of the Eastern Cape. The participants are predominantly English, Afrikaans, and isiXhosa-speaking, and come from impoverished and crime-ridden locales.

2.6 Collection and Analysing Data

Prior to each one-on-one interview, I introduced myself to the interviewee, providing background about myself and my research, and then presented the participant with an information sheet and consent form. After they read the papers, I allowed them

to ask questions, and then instructed them where to sign on the consent form. I gave each participant a copy of the consent form they had signed. Where permission was granted in writing, I recorded the interviews with my phone and also took notes throughout the interview. The one exception to this process was my interview with the two women who were survivors of coercive *ukuthwala*. Masimanyane arranged the interviews with the women during my time in East London. The Masimanyane staff who took part in the group interview explained my research to the women in isiXhosa and obtained oral consent for me to interview and record them.

Following each session I uploaded each interview to Dropbox. I then saved each interview to my password-protected computer, encrypting each file with a password to protect the identity and information of each participant. Within a week to two weeks following each appointment, I transcribed the interviews and saved them to my computer in a password protected format. Where I did not obtain permission to record, which only happened for one interview, I typed out my notes from the interview and also encrypted the file.

As the dissertation centres descriptions of the help-seeking trajectories of marital rape survivors, anecdotal and thematic information was drawn from the data. To categorise the data, I employed the open coding technique, an "interpretative process by which data are broken down analytically."[161] During my fieldwork, perceptible subject strands had begun to emerge organically. I made notes when struck by certain words, expressions and tones that the participants used, and also paid attention to observations that recurred in interviews and that the participants emphatically raised. I used my recollections and field notes as I commenced the coding process in February 2018. I re-listened to each interview to check the accuracy of my transcripts, and to recall the feel and content of each interview. I combined the impressions taken from the recordings themselves with areas I highlighted during my time in the field.

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[161] Juliet Corbin and Anselm Strauss, "Grounded Theory Research: Procedures, Canons, and Evaluative criteria," *Qualitative Sociology* 13, no. 1 (1990): 12.

Noting differences and similarities in the subjects I discerned, I assigned each one a "conceptual label" in order to isolate similar perspectives and experiences presented by the participants into categories and subcategories.[162] The two overarching categories are: factors that hinder recourse seeking; and beneficial forms of recourse seeking. Thereafter, I compiled a chart of subcategories, pulling out quotes from the transcripts that substantiated those themes. This chart was workshopped and further refined in consultation with my supervisor, and a mentor, Dr Kelley Moult. The structure of my empirical chapters follows the two categories and numerous sub-categories that I developed through the open coding.

2.7 ETHICS

Not only does this research project address a sensitive issue – that of violence against women in marriage – but the methodology also entailed interviewing and holding discussions with human beings. The very human-oriented nature of my research focus and methods gave rise to several ethical concerns, which I articulated in my application to the Law Faculty's Research Ethic Committee in August of 2016. Ethical clearance was granted in November 2016. In June of 2017, the Committee granted an amendment to this clearance on the basis of a change to my group interview methodology. This section outlines the ethical concerns and how they were mitigated during research process. Thereafter I detail the benefits of the study.

2.7.1 Risk and Minimisation of Harm

Though I mainly interviewed seasoned women's rights community workers, I remained cognisant of potential risks of harm to the staff of Masimanyane and Mosaic. Discussing such a painful topic had the potential to cause trauma to the staff even though they address these issues on a regular basis in a professional capacity. Several of the staff revealed to me that they are survivors of abusive relationships themselves and that this is what inspired them to do the work that they do. Moreover, spending time in the interview took time away from the staff's already very busy schedules. Taking these factors into

[162] Ibid.

consideration, I ensured that I scheduled interviews at a time that was convenient for each participant, and that management was aware of the interviews. Additionally, both verbally and in writing, I made clear to the participants that they had the right to refuse to participate further in the study should they become uncomfortable during the interview or object to the study on any basis. I emphasised the confidentiality of the interviews and that I would not use any identifying information in future written outputs.

In terms of the staff's mental well-being, during the interviews I asked the participants how they feel about their work, how they cope with the stress of the job, and paid attention to their demeanour to ensure that they continued to remain positively engaged. The staff members are experienced employees and were at ease in discussing gender violence, although some were emotionally affected when they recalled certain cases. Positively, at both organisations, significant support is offered to the staff. They debrief regularly, and also have access to counselling and other services.

There are more risks in speaking to survivors of marital rape. Marital rape is one of the most concealed as well as prevalent forms of sexual abuse. Most victims will never speak about it or seek assistance. Families also tend to prefer to keep this violence a secret for the sake of saving face within their communities. Hence, not only is it difficult for women to talk about this violence and conceptualise it as rape, but there are also risks involved if it is discovered that wives have spoken to outsiders about their experiences (including retaliation by husbands or family members). For these reasons I chose to only speak to survivors who were clients of either organisation – knowing that they had already begun to receive help and education, and had come to these organisations of their own will and felt safe. As clients, the participants would have access to further counselling and other support if needed.

Prior to the group interview, I spoke to the Masimanyane staff about ethical considerations for the women, and in this way communicated that we must seek consent and outline the purpose of my research to the survivors. I did not know the specifics of what Masimanyane communicated to the survivors when they made the invitation and so wanted to ensure that we were all on the same page, and that the survivors had clarity

about the purpose and scope of the interview. After we provided background about my research to the survivors, the Masimanyane staff obtained verbal consent for the interview, informed the survivors that it was voluntary, and also obtained consent for me to record the discussion.

The staff's presence was a significant factor in reducing harm to the participants. They had done work in the survivors' communities, had counselled them, and worked with them through their journeys of healing and empowerment. Their presence helped to create a greater atmosphere of assurance and familiarity for the survivors. The staff were attuned to how to broach certain sensitive subjects, what linguistic terms to use, and could communicate my questions in an effective and culturally appropriate manner. One of the survivors did become emotionally moved during her interview and cried throughout the latter part of her telling. We took breaks to allow her to breathe, comforted her, and allowed her to proceed at her own pace.

Masimanyane covered the travel costs of the survivors and also served us lunch and beverages. Following the interview, we all hopped into my rental car and I drove the participants to a petrol station where they could hitchhike back to their homes, which is the standard practice in Eastern Cape. The staff ensured that the survivors found a ride, and then we returned to the Masimanyane office.

2.7.2 Benefice

As marital rape is infrequently studied or discussed, this research encouraged both staff members and community members to share experiences and opinions that may typically not be given such a direct outlet. The group interview with the survivors provided a safe space in which the women could open up about their lives, their emotions and their hopes, and trust that their perspectives are respected and valued by the researcher. While they may derive little benefit from the written thesis itself, the participants' awareness that they have played a role in this research will be a benefit. On a personal level, discussing marital rape and intimate partner violence was also a cathartic experience for the participants, albeit painful as well. It helped them to know they are not alone, allowed

them to learn from each other's journeys, and to receive reassurance from Masimanyane's ongoing concern and support.

The staff that I have interviewed are professionally and personally committed to bettering the lives of women in South Africa and have been making considerable efforts and impact in their respective communities. Participating in the research has given them a further opportunity to speak about a form of violence that affects a large number of their clients, and may also assist them in adjusting how they frame their work with marital rape victims. The organisations' leadership has requested that any written materials will give acknowledge to their work and participation in the research. This is important to them and to myself, as we see this as a research partnership. Once my dissertation has been graded and approved by the Higher Degrees Committee of the Law Faculty, and Doctoral Degrees Board of UCT, I will provide Mosaic and Masimanyane with hard and soft copies of the dissertation. I will also be communicating with the leadership of each organisation in order to debrief about the research process, and to provide seminars to the staff presenting my findings.

3 Chapter 3: A History of the Ambivalent Place of Marital Rape in the Legal Sphere

3.1 INTRODUCTION

There exists a resounding ambivalence about marital rape. It is found not only in the day-to-day interactions and beliefs of South African citizens, but also permeates the various manifestations of the law that touch women's lives. Admittedly, since the early 1980s there has been immense legislative progress according women greater rights in marriage The abolition of the common law "marital power" rule,[163] the passage of the Recognition of Customary Marriages Act (RCMA),[164] and the recognition of family violence,[165] are illustrations of the positive evolution of the law. A component of the legislature's attention to family violence, the criminalisation of marital rape in 1993 marked a high point of the legislative reform.[166] But, the path towards this reform, and the legacy of the discourse of that era, portray a decidedly less rosy picture about the state's perceptions of marital rape. That picture is the subject of this chapter.

The purpose of the present chapter is to provide a historical grounding for my later discussions of how harmful conceptualisations of marital rape continue to resonate within state and social structures. My surveying is shaped by the research sub- question: Prior to

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[163] The marital power rule gave a husband power over his wife's person and property. It was undone by the Matrimonial Property Act. See Chapter II of the Matrimonial Property Act 88 of 1984. The Act however did not apply to marriages by Black people.

[164] Recognition of Customary Marriages Act 120 of 1998 (RCMA). One of the purposes of the RCMA, stated in the Preamble, is to "provide for the equal status and capacity of spouses in customary marriages." The RCMA removed any remaining aspects of the marital power from Black marriages.

[165] In the form of the Prevention of Family Violence Act 133 of 1993 (PFVA), which created an interdict system for violence in the family, imposed a mandatory reporting requirement for child abuse, and criminalised marital rape. The Domestic Violence Act 116 of 1998 (DVA) replaced the PVFA, expanding the scope of "family" with the broader category of "domestic relationship," and also introducing a broad definition of "domestic violence." See Section 1 of the Act, which provides Definitions.

[166] Section 5 of the PFVA.

and post-1993, how have ostensibly progressive legal and policy developments contributed to a disavowal of marital rape? Implementing the feminist practice of questioning and probing, I interrogate the processes that led towards the undoing of the marital rape exemption. In doing so, I bring to the surface the discriminatory and superficial motivations that were present even as the marital rape exemption was swept away.

In fulfilment of the central aim of this dissertation, which is to document how institutions (in)visibilise marital rape, in this chapter I unearth the tenuous position of marital rape in legislative reform from the end of the apartheid-era and into South Africa's new democracy. My investigation illuminates that legislative reform did little to dismantle patriarchal stereotypes about marriage within the very state institutions mandated to protect women. Even in the democratic era, marital rape did not feature prominently in the reform of the domestic violence framework.

I illustrate the uncertain and marginalised place of marital rape within the legal and policy arenas by appraising four historical periods: the origin of the marital rape exemption in South African common law; the unfavourable legislative reform of the late 1980s; the eventual abolition of the exemption by the Prevention of Family Violence Act (PFVA) in 1993; and more women-centred legislative reform in the democratic era. The first section will narrate how the marital rape exemption was taken to be a part of South African common law based on Roman-Dutch and English law precedents. Although a minority of legal voices questioned the legitimacy of the marital rape exemption, it was largely countenanced and applied by legislators, judicial actors and scholars.

The subsequent part of this chapter details the history and nature of the South African Law Commission's (SALC) recommendation in the mid-1980s to undo the marital rape exemption. Subsequently, Parliament rejected this recommendation and further entrenched the place of the marital rape exemption in law by writing it into statute in 1989. I expose how both the SALC's investigation and the response by policymakers revealed a deep and widespread cynicism about marital rape. They displayed a preoccupation with preserving family and the institution of marriage, and a disregard for the individual rights of women.

The outcomes of the 1980s made the developments of the 1990s all the more surprising. The third section chronicles how just a few years after the 1989 reform, the marital rape exemption was swiftly removed from South African law by the PFVA. I argue that this victory was not as straightforward as it appeared. As a product of political expediency, the PFVA was a highly flawed bill that relegated women's voices and concerns to the periphery. The marital rape criminalisation provision was only added during the final stages of the drafting. Lastly, I recount how the PFVA was replaced in 1998 by the Domestic Violence Act (DVA), a more woman-centred and feminist-driven piece of legislation.[167] While an international human rights philosophy took root within state structures at the advent of democracy, and women's rights gained greater prominence, I argue that the state still neglected to sufficiently address marital rape in the DVA.

3.2 The History of the Marital Rape Exemption Under South African Common Law

3.2.1 The Roots and Parameters of the Marital Rape Exemption

Under South African common law, the marital rape exemption ensured that a husband could not be held criminally liable for raping his wife. It was legally impossible. The moment of the exemption's assimilation into South African law is unclear as the foundation of the common law was an amalgam of the traditions imparted by colonial forces. From the English branch, the exemption's basis is found in a quote by Sir Matthew Hale, who wrote in 1736 that "the husband cannot be guilty of a rape committed by himself upon a lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."[168] In England and its colonies, including South Africa and the United States, these words provided authority for the existence of the marital exemption under common law. Under the guise of a contract that only served the husband's interests, a wife was taken to have given her irrevocable consent to sexual intercourse for the duration of her marriage.

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[167] Domestic Violence Act 116 of 1998 (DVA).

[168] Sir Matthew Hale, *History of the Pleas of the Crown* (London, 1736), 629.

The Roman-Dutch branch of South African law carried an even firmer position given the "inferior" and "subordinate" status of women under Roman-Dutch law, and the numerous authoritative legal writings on the subject.[169] As early as 1650, Damhouder reasoned that a husband has "full right to the person of his wife with whom he has consummated a marriage."[170] Some decades later, Huber explained the lesser position of wives as follows, at the same time sanctioning the use of force:

> Husbands have, in the first place, such authority over their wives as is given by the laws of nature, of God and of all nations, namely, that wives must be subject to their husbands in all things which do not clearly conflict with honour and virtue. Since no power in the world can be effective without compulsion, the husband must also possess certain means of compulsion, in case the wife refuses to bow to his sway in reasonable matters.[171]

In line with Huber and Damhouder, in 1764 another legal authority, Moorman, stated that a husband possesses full authority over his wife's person, and that the rape of a wife by her husband is not punishable under the law.[172]

Oddly, the South African courts never directly confronted the legitimacy of the marital rape exemption under South African law.[173] Instead, relying upon the iterations outlined above, the exemption was taken to be a part of the common law and applied in various judgments, each following the precedent set by the former. Early Appellate Division decisions such as *R v Mosago & another*, *R v K*, and *R v Z* serve as examples.[174] In

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[169] Kaganas, "Rape in Marriage," 457.

[170] Joost de Damhouder, *Practycke in Crimineele Saken* (1650).

[171] Ulricus Huber, *Heedendaegse Rechtsgeleertheyt* (The Jurisprudence of My Time)(Amsterdam, 1768), (Durban, Butterworths, translated by Percival Gane, 1939), 46.

[172] Nico Swartz et al., "Is a Husband Criminally Liable for Raping His Wife? A Comparative Analysis," *International Journal of Academic Research and Reflection* 3, no. 3 (2015): 9; J Moorman, *Verhandelinge over de Misdaden en de selver Straffen* (Treatise Concerning Crime and Its Penalties) (1764).

[173] Kaganas, "Rape in Marriage," 457; P.M.A. Hunt and J.R.L. Milton, *South African Criminal Law and Procedure II: Common-Law Crimes* 2nd ed. (Cape Town: Juta, 1982), 438 n 99.

[174] *R v Mosago & Another* 1935 AD 32; *R v K* 1958 (3) SA 420 (A); *R v Z* 1960 (1) SA 739 (A).

these cases, as in several others, the common law definition of rape by a man was articulated as "carnal connection with a woman (not his wife) without her consent."[175] South African writers also saw the exemption as forming a part of common law.[176] Quoting English law, Gardiner and Lansdown reasoned:

> The carnal knowledge must be unlawful. A woman, by entering into marriage, is held to have given an irrevocable consent to carnal connection with her husband, and, however she may resist and however unreasonable his wishes may be, a husband who forces his wife to have connection with him against her will does not commit rape…but he may be found guilty of assault - *R v Miller* (1954) 2 All ER 529.[177]

Hence, the dominant view amongst the courts and academics was that a husband held a practically unqualified right to sexually access his wife, even through use of coercive methods. Such transparent sexual coercion would never rise to the level of rape under the law, as a wife had no right to refuse her husband. A husband could only be charged with assault.

3.2.2 Minority Critiques of the Exemption

The almost unquestioning acceptance of the exemption's place in South African common law, and lack of reflection on the acceptability of such a rule in modern times, was critiqued by a minority of academics and justices, notably in the 1980s. Speaking to the weak foundation of the exemption, Hunt reasoned: "Such authority as there is for the rule in South African law is flimsy. Besides the scant Roman-Dutch authority... the support for the rule derives from English law… and two dicta of our courts... No South

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[175] *R v Gumede* 1946 1 PH H68 (N); *R v Mane* 1948 (1) S.A. 196, 199 (ECD); *S v Ncanywa* 1993 (2) SA 567 (CKA).

[176] J.M.T. Labuschagne, "Misdade Tussen Gades," *Tydskrif vir Hedendaagse Romeins-Hollandse* 43, no. Reg 39 (1980), 40-41; Hunt and Milton, *South African Criminal Law*, 437.3; W. Joubert, *The Law of South Africa* (Durban: Butterworths, 1982), 247; H.R. Hahlo, *The South African Law of Husband and Wife*, 5th ed. (Cape Town: Juta, 1985), 132.

[177] F.G. Gardiner and C.W.H. Lansdown, *South African Criminal Law and Procedure*, 6th ed. (Cape Town: Juta, 1987), 1623.

African court has yet definitively decided the point."[178] In the 1985 judgment in *S v H*, despite applying the exemption due to legal precedent, Justice Nienaber put forward strong reservations about the rule:

> … (i)f that (the rule) is indeed the state of our law on which I prefer to express no view there is little cause for complacency about it. The rationale for the rule is, to say the least, suspect, its support in authority is thin, and it offends against contemporary conceptions of morality. English Judges have sought to explain the rule by postulating the wife's irrevocable consent… Whether it is sound policy for the law to maintain that position… is of course a debate of a different kind, which is deserving of the attention of the Law Commission and the Legislature.[179]

The views of Hunt and Nienaber epitomise that the marital rape exemption was not perceived as an undisputed and valid component of South African common law. Even where academics and judges applied the exemption based on precedent or literature, they critiqued its provenance and questioned whether, in light of contemporary ideals, it should still have a place in common law. Still, the critical voices remained a minority.

The ongoing debate about the marital rape exemption was most starkly portrayed through a series of decisions from the Ciskei courts in the *Ncanywa* cases.[180] The Ciskei was one of the ten Black homelands (Bantustans) created by the apartheid government to strip Black South Africans of their South African citizenship and enforce race-based spatial separation.[181] The *Ncanywa* cases concerned a husband who had been convicted for rape and attempted rape of his estranged wife and sentenced to eight years imprisonment (with five suspended). When the crimes were committed, the couple was not living together and divorce proceedings had been initiated. The husband had gone to the house where his wife was staying. Upon finding her in a room with another man, he accused her of committing adultery, and proceeded to assault his wife and the man. He then ordered this

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[178] Hunt and Milton, *South African Criminal Law*, 99.

[179] *S v H 1985* (2) SA 750 (N) 752-53.

[180] *S v Ncanywa* (1993); *S v Ncanywa* 1992 (2) SA 182 (CK).

[181] See Bantu Authorities Act 68 of 1951; Bantu Homelands Citizens Act of 1970.

man to have intercourse with his wife but he was unable to do so. The husband subsequently removed the man from the room and raped his wife.

The husband appealed the decision of the General Division Court on the basis that under South African law, and therefore by extension the law of the Ciskei, a husband could not be convicted for raping his wife.[182] Writing in 1992 for the Ciskei Supreme Court in Bhisho, Justice Heath affirmed the conviction handed down by the trial court, concluding that the marital rape exemption was not part of South African law. He expounded: "The fiction of consent and even irrevocable consent by a wife to intercourse with her husband has no foundation in law and offends against the *boni mores* of any civilised society... The husband and wife have in modern society become equal partners with full dominium over their own bodies."[183]

At the time of the Ciskei Supreme Court's decision, there had been significant developments in England and Scotland that bolstered Heath's standpoint. In 1991 the House of Lords abolished the marital rape exemption under English common law, finding that Hale's statement no longer reflected the status of women, and that common law must evolve.[184] In 1989, the High Court of Justiciary in Scotland pronounced that "(n)owadays it cannot be seriously maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances," and held that if the marital rape exemption "had ever been part of the law of Scotland," it was "no longer so."[185]

The Ciskei Supreme Court cited to this progress in support of its opposition to the exemption:

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[182] The Ciskei legislature did have the power to change the law with respect to marital rape, but until it did so, the South African common law rule on marital rape applied to Ciskei. See *S v Ncanywa* (1993), 331-332, 338(1).

[183] *S v Ncanywa* (1992), 212B-C.

[184] *R v R* [1991] UKHL 12, 616B-D.

[185] *S v HM Advocate* 1989 SLT 469, 473G-H.

> …it is overwhelmingly likely that South African society is against such an old-fashioned principle and that society will regard it as obsolete, insofar as it might have existed. Support for the view that the rule has become obsolete is to be found in the English law and Scottish law. It is unlikely that any civilised country or legal community will still adhere to such a principle.[186]

Judge Heath's declarations were undoubtedly pivotal as they infused legal discourse with compelling arguments against the exemption.[187] As a caveat, Campanella points out that the 1992 *Ncanywa* judgement did not hinge upon the repulsive or archaic nature of the marital rape exemption itself, but rather, the Court's view was that "it is not and had never been part of South African or Ciskei law, as it had never been properly received into either legal system."[188] No matter the basis of the Court's decision, its unambiguous stance on marital rape was a high point in the legal history of South Africa.

3.2.3 The Triumph of the Exemption in Jurisprudence

The *Ncanywa* Ciskei Supreme Court's ruling in 1992 was subsequently appealed to the Ciskei Appellate Division in Bhisho. The Appellate Division's *Ncanywa* judgment in 1993 is remarkable for its revelation of the state's unyielding adherence to the exemption, despite arguments in South Africa and abroad in favour of advancing common law. The panel of judges in *Ncanywa* concluded that, notwithstanding the changes in the English and Scottish law, the rule remained firmly settled in South African and Ciskeian law. They reasoned that Roman-Dutch law still provided a foundation for the rule. Under this law there was "no such fiction" like the one which had existed under English common law; instead, the "rule was a consequence of marriage."[189] Further, the opinions of "eminent" justices of South Africa's Appeal Court also provided a solid authority justifying the

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[186] *S v Ncanywa* (1992), 211F-H.

[187] It should be pointed out that Heath's language was not without discriminatory elements. Speaking to one of the unfounded fears around criminalising marital rape, Justice Heath warned that women should not use a change in the law as "licence to avenge or to convert their grievances against their husbands into a charge of rape." Ibid., 182J.

[188] Campanella, "The Marital-Rape Exemption," 33.

[189] *S v Ncanywa* (1993), 338.

determination that the marital rape exemption was a part of South African law.[190] The Court did however point out that the recommendations of the South African Law Commission (SALC) in 1985 could assist the Ciskei legislature in determining whether or not to abolish the exemption.

The vacillating opinions of South African and Bantustan courts and academics in the pre-PFVA era indicate that the common law might have continued to develop and move in the direction of the England and Scotland. But in the end, the matter was decided statutorily. In 1989, legislative reform indirectly cemented the marital rape exemption in statute, without codifying the exemption itself.

3.3 The Unfavourable Legislative Reform Efforts of the Late 1980s

3.3.1 The SALC Recommendations on Marital Rape

The 1980s had a promising start. The government implemented significant changes in the law to grant wives broader rights. Under the apartheid legislative structure of the time, the reforms only applied to persons designated as White, Indian or Coloured. A husband's right to "moderate chastisement" of his wife was done away with, as well as his right to control her freedom of movement.[191] In terms of property, legal reform in 1984 resulted in the elimination of the marital power, which accorded the husband control over his wife's estate and person.[192] In the Western Cape, from 1979 to 1982, a significant media focus on rape emerged.[193] Kaganas and Murray found that this media coverage did not result from the efforts of feminist groups but unexpectedly stemmed from the Attorney General's determination to bring attention to the "prevalence and seriousness" of rape.[194] In 1982, the matter of how rape cases were being deficiently handled by the

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[190] Ibid.

[191] Kaganas and Murray, "Law Reform," 288.

[192] Chapter II of Matrimonial Property Act 88 of 1984.

[193] SALC, *Women and Sexual Offences.*

[194] Kaganas and Murray, "Law Reform," 288.

criminal justice system was raised with the Minister of Justice, who in turn requested that the SALC undertake an investigation on the subject. The initial efforts of the Western Cape Attorney General culminated in the 1985 SALC report entitled *Women and Sexual Offences in South Africa.*[195]

The hopeful developments of the early 1980s belied what would come later in the decade. For one, the SALC report, as it concerned women's rights, did not live up to expectations. Taken at face value, the SALC report is a seemingly beneficial document. Notably, one of the recommendations of the SALC was that marital rape be criminalised.[196] But, overall the report was a great disappointment to feminists. The SALC's investigation for the report and its findings exhibit a hostility towards women's interests and feminists; a scepticism about the seriousness of rape; and an ignorance of the criminal justice system's poor treatment of rape cases.[197] For example, claiming a "relatively limited response from women's organisations and the general public" the SALC report cuttingly questions "whether there really is so much dissatisfaction in South Africa with the law relating to rape as is generally made out by the press."[198]

The SALC's conclusions on marital rape were considered controversial and received significant media attention.[199] Those who responded to the SALC's questionnaire were equally divided on the issue, and staunch support for the exemption was expressed.[200] In the face of the opposition, the SALC reasoned that limiting a husband's culpability to assault "does not satisfy one's sense of justice," and relied upon

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[195] Ibid.; SALC, *Women and Sexual Offences.*

[196] SALC, *Women and Sexual Offences,* 179.

[197] Kaganas and Murray, "Law Reform," 288; Colleen Hall, "Sexual Politics and Resistance to Law Reform: A Critique of the South African Law Commision Report on Women and Sexual Offences in South Africa" (LLM diss., Faculty of Law, University of Cape Town, 1987).

[198] SALC, *Women and Sexual Offences*, 11.

[199] Ibid., 24.

[200] Ibid., 35-36.

what it termed "jurisprudential arguments" in its decision to favour abolition.[201] Amongst other bases, it referred to developments in family law, the fallibility of the irrevocable consent to sexual intercourse in marriage theory, and inconsistencies in standards applied to married versus unmarried women.[202]

Despite the disappointing tone of the report, the SALC's proposal that marital rape be criminalised was momentous. Concomitantly, it was crafted in such a way that marital rape prosecutions would in effect not succeed. In order to establish a compromise to appease the opposition, the SALC's recommendation included the caveat that no prosecutions could be initiated without the sanction of the Attorney General. This was included in order to prevent "frivolous" cases from entering the system, to increase the chances of reconciliation, and to ease the effects of the change in the law.[203] This stringent qualification signified the profound suspicion with which marital rape cases were viewed, and as a result the recommendation essentially reinforced many of the problematic assumptions that it sought to undo.

3.3.2 Parliament's Response to the SALC Recommendations

The damaging assumptions around marital rape reared their heads during Parliament's consideration of the SALC's recommendations from 1987 to 1989, obstructing any chances that statutory abolition would come to pass. The SALC's conclusions were incorporated into a bill put before Parliament in 1987 in the form of a clause reading: "1(1) Notwithstanding anything to the contrary contained in the common law, a man may be held criminally responsible for raping his lawful wife." [204] The Parliamentary Joint Committee that first considered the provision reported its findings in 1989, rejecting the SALC's position and substituting the clause with one prescribing that rape be considered an aggravating circumstance in assault cases where there is evidence

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[201] Ibid., 36.

[202] Ibid.

[203] Ibid.

[204] The Criminal Law and the Criminal Procedure Act Amendment Bill [B106-87 (GA)] 1987.

that the husband raped the wife.[205] The Joint Committee opposed the SALC's proposed clause on numerous grounds including that: the recommendation was of an emotional and sensitive nature; abolishing the exemption would increase the divorce rate, which is already high; criminal law should not intervene in marriage and family matters; it would be difficult to prove the crime of marital rape and the police would be flooded with claims; the "intimate and unique" nature of marriage, in which sex is guaranteed, makes it unacceptable for a husband to be threatened with a crime that may result in the death penalty; and, adequate remedies for wives already existed under civil law.[206]

Citing similar rationales, a majority in the three houses of Parliament supported the Joint Committee's stance. Bizarrely, the Parliamentarians were of the impression that the new legislation would accord women *greater* protection and that they were championing women's rights.[207] Yet, the deliberations were a patent display of the workings of patriarchy, the "systemic expression of male domination and control over women" which filters into all institutions.[208]

Parliament expressed little concern for women as individuals, as human beings deserving of sexual autonomy. As Milton commented: "most depressing of all is that" Parliament "seems not to have given any real consideration to the position of a wife as a victim of sexual assault."[209] In line with the members of the Joint Committee, the members of the three houses of Parliament employed tropes of male privilege: that the family unit must be respected and preserved; that the institution of marriage is a sanctified and private space; that wives are expected and obligated to be sexually available to their husbands;

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[205] Ibid.

[206] Hansard Hansard House of Assembly Debates (Hansard), 10 February 1989, cols. 556-60. For an overview, Milton, "Law Reform."

[207] Hansard, 10 February 1989, cols. 2683, 2697.

[208] Susan Boyd, *Canadian Feminist Perspectives on Law: An Annotated Bibliography of Interdisciplinary Writings* (Ontario: Resources for Feminist Research, Ontario Institute for Studies in Education, 1989), 2.

[209]Milton, "Law Reform," 82.

and husbands have a right to demand sex.[210] Surely a husband should not be punished for forcefully taking what is rightfully theirs? This sentiment was bluntly captured by the words of a Parliamentarian who uttered the following:

> It is simply unacceptable for one partner to be subject to the highest penalty – even in cases in which no violence has taken place – if the other party unreasonably refuses sexual accessibility and that party is left unpunished. This is the kind of inexplicable situation that arises when criminal procedure becomes involved with the most intimate things in the law of family.[211]

Though stated in non-gendered terms, this statement displays nothing if not sheer and unconcealed patriarchy in its most damaging of forms – that which plainly countenances violence against women and rationalises away the brutal actions of men. It casts women as invisible sexed subjects who hold no rights to have any say over their bodies, and are undeserving of the law's protection.

The disturbing, but very accurate conclusion drawn by Kaganas and Murray in their assessment of the Parliamentarians rationales, was that marital rape was perceived as "an understandable lapse, an overzealous insistence on conjugal rights."[212] In the end, Parliament passed the Criminal Law and the Criminal Procedure Amendment Act under which section 1 provided:

> Whenever a man has been convicted of assault in any form on his lawful wife and could, but for the existence of the marriage relationship between them at the time of the commission of the crime, have been convicted of rape, the fact that he could have been convicted of rape had he not been married to his wife, shall be regarded by the court as an aggravating circumstance at the passing of sentence.[213]

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[210] Kaganas and Murray, "Law Reform," 289-93.

[211] Hansard, 13 March 1989, cols. 2676-7.

[212] Kaganas and Murray, "Law Reform," 292.

[213] Criminal Procedure Amendment Act 39 of 1989.

A measure of redemption for wives would come four years later in the form of the PFVA. Yet, dissecting this legislative victory brings to light that it was less about women's protection, and more to do with political manoeuvring.

3.4 The 1993 Abolition of the Marital Rape Exemption

3.4.1 The Passage of the PFVA

The reform of 1989 brought a decade that had begun with promise to a disappointing close. Parliamentarians were blind to the damaging impact of the new legislative framework, a transparent depiction of how, as MacKinnon pronounced, "t(h)e law sees and treats women the way the men see and treat women."[214] The law is not an abstract and pure force, moving gradually and consistently towards a more enlightened place. The legislation of 1989 was given its form by men and even women, moulded by male-centricity.[215] Yet, at the end of 1993, in what appeared on the surface to be a drastic about-turn, the government enacted the PFVA, eradicating the marital rape exemption (and thus any tensions and debates pertaining to the common law). Section 5 of the PVFA, which was assented to on September 24th, 1993, read: "Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife."

The stated factors that served as the impetus for the legislation included the increase in family violence, especially violence against women and children; and a desire to create a civil system that would better address domestic violence.[216] For the sweeping

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[214] MacKinnon, "Feminism, Marxism."

[215] Kaganas and Murray discuss how several prominent women opposed the criminalization of marital rape, which reminds us that "that women do not necessarily present a 'natural' constituency supporting women's rights."; women's opinions are shaped by race, class, culture and religion. Kaganas and Murray, "Law Reform," 298. See also Belinda Bozzoli, "Marxism, Feminism and South African Studies," *Journal of Southern African Studies* 9, no. 2 (1983): 161.

[216] I.N. Frederick and L.C. Davids, "The Privacy of Wife Abuse," *Journal of South African Law* 3 (1995): 486. Frederick and Davids refer to the explanatory memorandum to the Draft Bill on the Prevention of Domestic Violence 1993, No 14591 *GG* 19-02-1993.

change that it brought in criminalising rape, and as South Africa's first piece of legislation specifically aimed at addressing domestic violence, the PFVA represented a "significant achievement."[217] In practical terms, the PFVA introduced an interdict system that allowed for victims of domestic violence to obtain restraining orders against their abusers, and permitted judges and magistrates to issue a warrant of arrest against the perpetrator upon breach of the order.[218]

At a theoretical level, the PFVA served the critical function of symbolising greater rights and possibilities for women.[219] Concerning the PFVA's enactment, Campanella reflected: "It signals the kind of change that can be expected of a legislature which has become more aware of issues of human rights and equality."[220] Zooming out of the South African context, it is useful to take stock of the global human rights context at the time of the passage of the PFVA. What relevant human rights norms had been articulated at that point in history?

The first part of the 1990s did represent a high point in the development and articulation of women's rights within the international human rights system. Just over a decade before, the foundational instrument of international women's rights law, the United Nations Convention on the Elimination of Discrimination against Women

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[217] Lisa Vetten, "Deserving and Undeserving Women: A Case Study of South African Policy and Legislation Addressing Domestic Violence" (MA diss., Political Studies, University of the Witswatersrand, 2013), 32; J. Campanella, "The Marital-Rape Exemption Resurrected," *South African Law Journal* 111 (1994): 39.

[218] Section 2 of the Act. For further information on how the interdict system worked in practice, see Anshu Padayachee and Rashida Manjoo, "Domestic Violence Support Services Will Fail without Agency Networking," *Agenda* 12, no. 30 (1996): 74-75. Padayachee and Manjoo outlined the PVFA implementation concerns raised at the Conference on Domestic and Family Violence in May 1996.

[219] Parashar notes that "(s)ymbolic legislation can be of liberating value as it can provide a focus around which forces of change can mobilize." Parashar, *Women and Family Law Reform*, 33.

[220] Campanella, "The Marital-Rape Exemption," 39.

(CEDAW) came into force.[221] It did not expressly address gender violence, but prohibited unequal treatment on the basis of marital status.[222] While any mention of marital rape is absent in the Convention, CEDAW formed a significant milestone as the first international convention dedicated to the rights of women.

Subsequent articulations by international bodies acknowledged the breadth and seriousness of violence against women in the family. For example, at the end of the United Nations Decade for Women (1976 – 1985), the Nairobi Forward Looking Strategies called attention to the various forms of violence against women, including familial violence.[223] In 1992, in its General Recommendation No 19, the CEDAW Committee confirmed that violence against women, including sexual violence and violence in the family, is a form of discrimination under Article 1 of the Convention. It outlined states' due diligence obligations to implement comprehensive measures (including legal mechanisms) to prevent violations of the Convention, punish transgressions against women, and provide protection for them.[224] From around 1993 onwards, international women's rights instruments began to conspicuously utilise the term "marital rape."

Although marital rape was not a central topic of human rights discourse at the time of the PFVA deliberations, international women's rights norms still clearly called for the protection of women from (sexual) violence within the family. Parliamentarians'

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[221] United Nations, Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, entry into Force 3 September 1981.

[222] Ibid., Article 1.

[223] Paragraph 258 of the Nairobi Forward Looking Strategies states: "Women are beaten, mutilated, burned, sexually abused and raped… National machinery should be established in order to deal with the question of violence against women within the family and society." United Nations, Nairobi Forward-Looking Strategies for the Advancement of Women, adopted at World Conference to Review and Appraise the Achievements of the UN Decade for Women, Nairobi 1985."

[224] United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N.Doc. A/47/38, 1992.

attitudes towards women during the 1989 legislative reform cast doubt on Campanella's conclusion that the PFVA reflected human rights awareness.[225] It is only when South Africa entered the period of democracy in 1994 that the government of the day, guided by the progressive ethos of the Constitution, began to ratify a plethora of human rights instruments, and to take greater stock of international norms.[226]

3.4.2 Critiquing the PFVA Through a Feminist Lens

The juxtaposition between the mood of 1989 when the regressive legislative reform took place, and the 1993 passage of PFVA, raises the question of how the PFVA came to criminalise marital rape despite lawmakers' adamant position against criminalisation just a few years prior. There are indications that the PFVA did not grow out of the government's unqualified embrace of women's right to be protected from violence.

One singularly worrying fact is that when the legislative reform process began, the first draft of the PFVA actually contained the same provision as the 1989 Criminal Law and the Criminal Procedure Amendment Act, the Act that retained the marital rape exemption.[227] It also added that where the parties to a marriage were living apart due to a breakdown in marriage the husband could be convicted of rape.[228] The second draft contained a provision based on the 1985 SALC recommendation (requiring written consent of the Attorney General for prosecutions), and the third criminalised marital rape without qualifications.[229]

The preliminary versions of the PFVA denote the drafters' and legislators' disregard for protecting women from sexual violence in marriage. It is ironic that a Bill designed to combat family violence initially preserved the marital rape exemption.

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[225] Campanella, "The Marital-Rape Exemption," 39.

[226] Vetten, "Deserving and Undeserving Women."

[227] Tonia Novitz, "The Prevention of Family Violence Act 1993," in *Issues in Law, Race and Gender* (Law, Race and Gender Unit; University of Cape Town 1996), 22.

[228] Ibid.

[229] Ibid.

Compounding the ambiguity of the PFVA is the fact that the reasons for the change between the first and final versions of the Bill are not apparent from the records available.

The radical shift between drafts of the PFVA, and speedy enactment of the law, may have had to with the political climate of the time. Feminist academics labelled the PFVA an eleventh-hour attempt by the National Party to gain more women voters during South Africa's transition from apartheid to democracy.[230] Questioning the underlying motivations for the Bill, Fedler observed: "As a prefatory critique of the timing and context of the Act, it is interesting to note that it was promulgated at a time when it was politically expedient for the Nationalist government to be seen and to seem to be doing something for women in order to attract the female vote in the April 1994 election."[231]

The consultations on the Bill were done in a rushed and superficial manner, and therefore the PFVA did not adequately incorporate the expertise or input of women's advocates, practitioners and academics.[232] At the time the PFVA was created, the National Party could have incorporated the knowledge of women's rights groups and experts. From the 1970s onwards feminist and women's groups steadily grew stronger and more visible in mobilising and lobbying around women's rights at political and local levels, with violence against women designated a critical issue.[233] Women's rights advocates had made significant gains by the early 1990s, in part galvanised by the National Party's

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[230] Novitz, "The Prevention of Family Violence Act," 1; Vetten, "Deserving and Undeserving Women."; Sheila Meintjes, "The Politics of Engagement: Women Transforming the Policy Process– Domestic Violence Legislation in South Africa," in *No Shortcuts to Power. African Women in Politics and Policy Making*, ed. AM Goetz and S Hassim (London: Zed Books, 2003); Fedler, "Lawyering Domestic Violence," 234; Elsje Bonthuys, "The Solution? Project 100-Domestic Violence," *South African Law Journal* 114 (1997): 372.

[231] Fedler, "Lawyering Domestic Violence," 234.

[232] Bonthuys, "The Solution?," 372.

[233] For an overview of local and regional organizing from the 1970s into the early 1990s, concerning women's rights, domestic violence and rape - but from different and sometimes divergent perspectives - see Vetten, "Deserving and Undeserving Women," 84-88; Meintjes, "The Politics of Engagement," 141-50.

unbanning of the African National Congress and other political parties in 1990.[234] Despite the formation of strong multi-party and multi-sectoral women's alliances, the National Party hurriedly published the Bill, much to their surprise and consternation.[235] According to Meintjes, the National Party did not even consult with Women's National Coalition – of which it was a member – a network of political and civil society groups that came together in 1992 to put women's issues on the political and legislative agenda as South Africa transitioned to democracy.[236]

On the subject of marital rape, some scholars also questioned whether the PFVA was the best legislative home for the criminalisation of marital rape provision given that it is a civil statute. Branding the marital rape provision a "legislative afterthought," Fredericks and Davids maintained that "the provision belongs in the Criminal Procedure Act since the proper forum for such a crime is the ordinary criminal courts."[237] Concerned about matters of proof, Novitz critiqued the PFVA for failing to "address the problem of substantiating the charge."[238] Referring to the deplorable manner in which the criminal justice system treated rape victims, she commented that "(i)t has always been difficult to establish rape in a relationship of past intimacy, and the PFVA does nothing to remedy this."[239]Adding to its already conspicuous inadequacies, the PFVA was "not accompanied by government funding for support structures or by programmes to address gender bias in the police and court system or by initiatives to put an end to the inadequacies of the maintenance court system."[240]

The criminalisation of marital rape via a civil statute possibly betrays the

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[234] Ibid.

[235] Meintjes, "The Politics of Engagement," 148-51.

[236] Meintjes, "The Politics of Engagement," 142-3, 149.

[237] Frederick and Davids, "The Privacy of Wife Abuse," 487.

[238] Novitz, "The Prevention of Family Violence Act," 23.

[239] Ibid.

[240] Joanne Fedler, "Lawyering Domestic Violence through the Prevention of Family Violence Act 1993 - an Evaluation after a Year in Operation," *South African Law Journal* 112, no. 2 (1995): 237.

legislature's wariness of family matters being placed within the ambit of the criminal justice system. In fact, one of the stated reasons for the PFVA was to create a system that would "contribute to a strategy to deal with domestic violence *outside the criminal courts in order to maintain family unity*" [emphasis added].[241] Though progressive in creating an interdict system and targeting family violence, ultimately, the PFVA was a conservative piece of legislation designed to protect the interests of the traditional family unit. By prioritising the family unit to the detriment of women's individual autonomy and rights, the PFVA in turn perpetuated the ideals that underpinned the preservation of the marital rape exemption in the 1980s. Women's needs and rights were again relegated to the margins.

3.5 The Demise of the PFVA and the Passage of The DVA

3.5.1 A New Era of Legislation-building with Feminist and International Human Rights Influences

The PFVA had a multitude of limitations. For instance (aside from children living in the home impacted by the violence) the Act only applied to heterosexual married and cohabiting couples, and did not contain a definition of violence.[242] It was highly flawed in terms of the interdict procedure, the lack of guidance given to authorities, and challenges in its practical application, all of which led to a slew of critiques from interested parties, including feminist commentators.[243] The procedural deficiencies of the PFVA led to its undoing. After a short life of around five years, it was replaced by the more robust, human rights-oriented and gender-sensitive DVA, which came into operation in December 1999. The PFVA was a product of its time, and one of the last creations of a withering regime. Although the rights and concerns of women may have only tangentially formed part of the impetus for the PFVA, and in spite of its blatant deficiencies, the Act decisively removed the marital rape exemption from South African law.

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[241] Frederick and Davids, "The Privacy of Wife Abuse," 487.

[242] Padayachee and Manjoo, "Domestic Violence Support Services," 75.

[243] Fedler, "Lawyering Domestic Violence."; Bonthuys, "The Solution?"; Novitz, "The Prevention of Family Violence Act."; Padayachee and Manjoo, "Domestic Violence Support Services."

In response to legal procedural critiques levelled against the PVFA in 1995, the SALC commenced the process of considering options for replacing the Act.[244] By 1996, the Commission received approval to incorporate a domestic violence legislation investigation into its program, and from there it undertook numerous processes to engage with stakeholders and canvass opinions on appropriate legislation.[245] By September of 1997, the Minister of Justice created the Project Committee on Domestic Violence to "assist" with comments received on the SALC's Discussion Paper 70 on Domestic Violence, and to "steer the process towards a final report and draft legislation."[246] In an unusual but enlightened shift, the Project Committee consisted not only of academics, but also a formidable team of feminists, including community activists.[247]

It appears that the innovation to include a diverse grouping of experts in part stemmed from feminist legal scholar Bonthuys' recommendation that the Commission "co-operate with NGOs which have experience in working with the problem and can provide a broader insight into what victims of domestic abuse really need."[248] In addition to their grassroots advocacy, some members of the DVA Project Committee, such as Rashida Manjoo and Lesley Ann Foster, also brought valuable international human rights expertise.[249] Consequently, in contrast with the PFVA, the DVA was drafted with the

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[244] SALC, *Domestic Violence* Research Paper (1999), 3.

[245] Ibid., 3-4.

[246] Ibid., 4-5.

[247]Vetten, "Deserving and Undeserving Women," 33. Feminist Project Committee members included: Mandisa Monakali (of Ilitha LaBantu), Rashida Manjoo (of the Advice Desk for Abused Women), Helene Combrinck (at the time part of the University of Western Cape, Women and Human Rights Project), Joanne Fedler (of Tshwaranang Legal Advocacy Centre), Lesley Ann Foster (of Masimanyane Women's Centre), Mmatshilo Motsei (of Agisanang Domestic Abuse Prevention and Training).

[248] SALC, *Domestic Violence,* 4; Bonthuys, "The Solution?," 388.

[249] Vetten, "Deserving and Undeserving Women," 34.

direct input of feminist and women's rights experts and practitioners.[250]

The engagements by the SALC and Project Committee from 1996 to 1998 culminated in the DVA. The DVA contains more expansive and detailed definitions of "domestic violence" and "domestic relationship," and creates broader legal remedies than the PFVA.[251] It repeals all sections of the PFVA, except section 5, the one criminalising marital rape.[252] The drafting process was not without contestation. Feminist experts persistently sought to expand the SALC's framing of the domestic violence problem and to draft the DVA in unequivocal gendered terms.[253] Eventually, the DVA was sent to Parliament prematurely, while the Committee was still working on it, and the final version represented a watered down and less woman-focused version of what the Committee thought ideal.[254]

Inadequacies aside, the DVA represents a vast improvement from the PFVA; the result, Vetten declares, of "unparalleled feminist involvement in the design of the law."[255] This very perceptible development was undoubtedly shaped by South Africa's new human rights ethos following the demise of apartheid. In the new democratic era, the state committed to adhering to international human rights principles, and retained this awareness in terms of legislative reform and policy impacting women's rights.

The feminist influences in the DVA were in part made possible by the optimistic collective mood of the time; underpinned by the respect for international human rights

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[250] For detailed narratives on the processes around the creation of the DVA see Meintjes, "The Politics of Engagement."; Vetten, "Deserving and Undeserving Women," 33-43.

[251] For definitions, see Section 1 of the DVA, and for remedies and duties placed upon the police and the courts, see Sections 2-8.

[252] Section 21 of DVA the reads: "(1) Sections 1, 2, 3, 6 and 7 of the Prevention of Family Violence Act, 1993 (Act 133 of 1993), are hereby repealed."

[253] Vetten, "Deserving and Undeserving Women," 35.

[254] Ibid., 35-37, 40.

[255] Ibid., 42.

norms enshrined in the Constitution, and the various international women's rights instruments such as CEDAW (which South Africa ratified CEDAW in 1995), and the Beijing Declaration and Platform of Action (Beijing Platform).[256] The formation of South Africa's National Gender Machinery (NGM) also spurred progress. As a component of the NGM, in 1996 Parliament created the Ad Hoc Committee on the Improvement of the Quality of Life and Status of Women (in 1999 it became a permanent entity as the Joint Monitoring Committee). The Committee's mandate is to "monitor and evaluate progress with regard to the improvement in the quality of life and status of women in South Africa" in light of the state's commitments to CEDAW, the Beijing Platform and other international instruments.[257] Reflecting South Africa's progressive trajectory, the Preamble to the DVA cites South Africa's commitments to international obligations, including CEDAW.[258]

3.5.2 Naming Marital Rape: The DVA and the International/Regional Human Rights Context

Amidst the pro-women's rights mood of the mid-1900s, and the conscious inclusion of international women rights norms in legislation and policy initiatives, what consideration was given to marital rape as a discrete form of violence? Aside from retaining the PFVA section, the DVA says nothing explicit about marital rape, though this form of violence is contemplated within the definitions contained in the Act. The inclusive definition of "domestic relationship" covers marriage according to any law,

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[256] United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. For further information on the particular Constitutional Provisions and international instruments that the SALRC took cognizance of see SALC, *Domestic Violence*, 1-2, 10-21.

[257] Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, Report of the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, 10 April 2006, http://pmg-assets.s3-website-eu-west-.1.amazonaws.com/docs/2006/comreports/060606jmcwomenreport2.htm.

[258] Preamble to the DVA.

custom or religion.[259] The Act also lists sexual abuse as a form of domestic abuse.[260]

Indeed, the politics around naming of acts of gender-based violence are complicated, and the term marital rape does not universally resonate.[261] How acts of violence are categorised or understood is contingent upon an individual's experience, and influenced by their socio-cultural milieus.[262] Conceding the limitations of fixed terms such as marital rape, there is still something to be said about the naming of forms of violence. This is especially critical in the arena of sexual violence within marriage, as often cultural and religious imperatives supersede women's individual sexual rights. The crystallisation of naming at the international level has the power to shape states' orientations, and influence the nature of legislative reform. Pushing from the bottom up, civil society activists can leverage international human rights norms to compel states to act. Most importantly, at the level of the individual, naming marital rape is an integral part of survivors' being able to regard their experiences as abusive.[263]

It was only from the early- to mid-1990s that international women's rights instruments began to name marital rape. Although not binding on states, the Declaration on the Elimination of Violence against Women (DEVAW), adopted by the United Nations General Assembly in 1993, overtly lists marital rape as a form of sexual violence within the family.[264] The Beijing Platform, adopted at the Fourth World Conference on Women

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[259] See Section 1 (Definitions) of the DVA.

[260] Ibid.

[261] Many of the community workers whom I interviewed for my research expressed hesitation about using the term 'marital' rape as it does not resonate with their clients' understandings of their lived experiences.

[262] On definitional complexities see Yllö and Torres, *Marital Rape*, 4; Elaine Martin, Casey Taft, and Patricia Resick, "A Review of Marital Rape," *Aggression and Violent Behavior* 12, no. 3 (2007): 334-35.

[263] Liz Kelly, "How Women Define Their Experiences of Violence," in *Feminist Perspetives on Wife Abuse*, ed. Kersti Yllö and Michele Bograd (Newbury Park: Sage Publications, 1988), 114-32; Kottler, "Wives' Subjective Definitions."

[264] Articles 1 and 2 of the United Nations, Declaration on the Elimination of Violence against Women, adopted by General Assembly 20 December 1993, A/Res/48/104.

in 1995, also specifies marital rape as a form of violence against women.[265] Since the creation of the office in 1994, the United Nations Special Rapporteur on Violence Against Women has raised the profile of the topic through her reports, and has consistently called for explicit criminalisation of marital rape in various countries.[266]

At the regional level, the European system has been the most forward-thinking, with the European Parliament having called for the criminalisation of marital rape in 1986.[267] Under the Inter-American system, notable for its very progressive and influential jurisprudence on violence against women in the family,[268] the Convention of Belém do Parà does not specify the violation of marital rape.[269] In spite of that, its definition of violence against women encompasses sexual violence that takes place within "the family or domestic unit or within any other interpersonal relationship" signalling that the drafters were aware of the gravity and pervasiveness of intimate partner violence. [270] Though relatively recent, the seminal instrument on women's rights in Africa, conventionally known as the Maputo Protocol, contains a sanitised definition of violence against women,

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[265] Beijing Platform, para 113(a).

[266] See for example country reports of the Special Rapporteur on violence against women: United Nations Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to the Sudan*. 18 April 2016. A/HRC/32/42/Add.1; United Nations Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Algeria*. 13 February 2008. A/HRC/7/6/Add.2; United Nations Human Rights Council. *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Algeria*. 13 February 2008. A/HRC/7/6/Add.2. United Nations Human Rights Council. *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to India*. 1 April 2014. A/HRC/26/38/Add.1.

[267] Article 10 of the European Parliament, Resolution on Violence against Women, Eur. Parl. Doc. A2-44/86, OJ No C 176/73. 4.7.1986.

[268] See for example the landmark case *Maria Da Penha v Brazil*, Case 12.051, Report No. 54/01, Oea/Ser.L/V/Ii.111 Doc. 20 Rev. At 704 (2000).

[269] Organisation of American States, The Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, Adopted by the Organization of American States, 9 June 1994, 33 I.L.M. 1534 (Convention of Belém Do Parà).

[270] Convention of Belém do Parà, Article 2.

which encompasses sexual violence in "private" life. [271]

To their credit, the SALC did directly engage with the topic of marital rape, even though their final recommendation for the DVA was slightly lacklustre. The SALC report cites concerns raised by South African legal scholars about the inadequacies of the legislative framework in assisting marital rape survivors, and the necessity of a tailored approach for accommodating marital rape cases.[272] In response SALC reasoned: "The Commission takes cognisance of the concerns about marital rape. It is to be noted, however, that these points of criticism apply not only to marital rape, but also to rape in general."[273] It continued, stating: "(i)t is clearly incongruous to recommend changes to the legal position in respect of marital rape without reviewing the law of rape."[274] On that basis, the SALC adhered to its original recommendation that the DVA incorporate section 5 of the PFVA, unchanged, into the Act until rape law was reformed.[275] With the SALRC deciding to not consider the marital rape question until rape reform was placed on the legislative agenda in future, the former-PFVA section inhabits a solitary home in the DVA.

3.6 Conclusion

A cursory survey of South Africa's legislative history tells too simplistic a story. Through the circumspect exercise that I have carried out in this chapter, I have illustrated how the reform processes from the 1980s to early 1990s were fraught with inconsistencies and contestations. The path towards designating marital rape as a crime was itself

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[271] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted by the African Union, July 11, 2003 (Maputo Protocol), Article 1(j).

[272] SALC, *Domestic Violence*, section 6.8; SALC *Domestic Violence* (Project 100) Discussion Paper 70 (1997), section 4.8.

[273] SALC, *Domestic Violence* (Project 100), 20.

[274] Ibid.

[275] Ibid., 20-21.

uncertain, with conflicting and contradictory stances pervading judicial decisions and legislative reform processes.

During the apartheid era, the laws privileged the institution of marriage and the family. Problematic myths about marital rape loomed large throughout this period, enduring up until the second draft of the PFVA. Even though the PFVA was ostensibly designed to protect women, the schizophrenic turns during the drafting process, and the haphazard creation of the law without meaningful public consultation with women's rights groups, reflected the continued influence of discriminatory perceptions of marital rape. The legislators did not act from a women's rights consciousness.

In the post-apartheid era, South Africa has a relatively enviable and progressive legislative framework targeting gender-based violence. From the mid-1990s onwards the influence of human rights principles took root in local legislative and policy frameworks, and feminists played increasingly central roles in the creation of new domestic violence and sexual offences laws. Nonetheless, state actors repeatedly missed opportunities to squarely confront the retrogressive norms that underpinned the marital rape exemption for centuries. The DVA drafters left the marital rape question alone, believing that the idiosyncrasies of reporting and prosecuting intimate partner sexual violence would be attended to by wholesale rape law reform.

4 Chapter 4: The Language of Erasure in Contemporary Marital Rape Judgments

4.1 Introduction

A flood of marital rape cases never materialised.[276] Contrary to the Parliament's fears in the late 1980s about criminalising marital rape,[277] the South African criminal justice system has not found itself inundated with claims from aggrieved wives seeking to have their husbands prosecuted for transgressions against them.[278] The subject of the previous chapter tracked Parliament's and the judiciary's approval of the marital rape exemption in the 1980s and early 90s. The exemption presumed that marital rape was not rape given that wives owed their husband's unqualified sexual access, and that rape in marriage was a trivial matter not worthy of criminal redress. Notwithstanding the criminalisation of marital rape, and the ushering of an optimistic democracy shaped by human rights ideals, there remains the question of what happened to the stereotypes that supported the exemption for centuries.

This chapter investigates how the marital rape myths that underpinned the exemption have filtered into the present, specifically in the jurisprudence. I analyse the language of reported marital rape judgments at the level of the High Courts and Supreme

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[276] At least not as sexual offences under criminal law. Input from women's rights community workers in Cape Town and East London metropole indicates that women tend to obtain civil restraining orders against their husbands for abuse generally, as opposed to laying charges of rape.

[277] In 1989, one of the reasons Parliament cited for resisting the criminalization of marital rape was the fear that police would be flooded by claims. See Hansard, 10 February 1989, cols. 556-560.

[278] Though official state sexual offences statistics do not record the relationship between the perpetrator and the victim, research has demonstrated that, for intimate partner relationships, the rate of reporting rape to authorities is extremely low. See for example Jewkes and Abrahams, "The Epidemiology of Rape," 1232-33; Machisa et al., *The War at Home*, 49.

Court of Appeal (SCA)[279] to answer the question: How does contemporary South African legal discourse reinforce the myth that marital rape is a lesser form of rape? This question feeds into the dissertation's central aim which is to document how institutions that women seek help from render marital rape (in)visible.

In this chapter I engage with the theme of (in)visibility by demonstrating how patriarchal and stereotyped rhetoric in judicial sentencing determinations effaces the harm wrought upon survivors' bodies and psyches, relegating the crime of marital rape to a minor and justified transgression on the part of husbands. I seek to move past simply noting the presence of marital rape myths by scrutinising how they come to the courts, what influence they have, and what they signify. I also look at the sociological mechanisms that make possible the flourishing of rape legitimising language within an institution as critical as the judiciary.

Post the Prevention of Family Violence Act (PFVA), the universe of reported marital rape judgments that I located is small. In all six cases, the courts affirm the rape convictions of the trial courts. [280] Notwithstanding the final outcomes of the judgments, I found that in three of the cases the courts utilise rape myths and cultural stereotypes as mitigating factors in determining appropriate sentences for the perpetrators.[281]

Lonsway and Fitzgerald define rape myths as "attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male

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[279] The South African judicial system is tiered, with magistrates' courts being at the lowest level. The next level consists of the High Courts. Above the High Courts is the Supreme Court of Appeal, which deals with appeals from the High Court. The Constitutional Court sits at the top of the hierarchy but can only hear constitutional matters. For more details on the court system see, "The South African Judicial System," The South African Judiciary, accessed 20 February 2018, https://www.judiciary.org.za/index.php/the-south-african-judicial-system.

[280] The cases post-1993 cases identified are: *Sekese v S*; *W v Minister of Safety & Security & Others*; *S v Moipolai* ; *S v Mvamvu* ; *Rowles v S* ; *S v Modise.*

[281] *S v Mvamvu* ; *S v Moipolai;* and *S v Modise.*

sexual aggression against women."[282] I foreground my analysis of rape myths in South African by surveying domestic, comparative and international norms on violence against women which provide the South Africa judiciary with a framework for addressing marital rape. The framework serves as a standard against which the discriminatory language of judgments can be measured. In the first section, I also discuss the South African legislative sentencing scheme that was in application at the time the problematic judgments were delivered, as sentencing determinations are one of the key entry points for rape myths.

In the second section, as a basis for my analyses of rape myths in South African jurisprudence, I look at theory in law, criminology and psychology that counters simplistic conceptions of the operation of rape myths. This critical body of scholarship brings attention to how myths are locally, culturally and temporally contingent. In the subsequent section I introduce neutralisation theory, which is largely affiliated with criminology scholarship on deviant behaviour. Neutralisation theory is traditionally used to evaluate how criminal or immoral acts legitimated in the eyes of those who commit them, for example the justifications that rapists use to designate their acts as not being rape. By looking at the main trajectories of scholarship that feed into neutralisation theory and locating feminist voices within, I make the argument that the tools of neutralisation employed by criminals are helpful for contextualising biased language by judges.

In the fourth section of the paper, I apply neutralisation theory to dissect the sentencing language in the three problematic marital rape cases. I look at two types of justifications for marital rape put forward by judges in recent marital rape cases; the first being the notion that intimate partner rape is less serious than stranger rape. This is the denial of the victim technique. The second technique I consider is that of denial of injury through which rape is misconstrued as a non-violent or minor act. I end the chapter by describing feminist responses to the rape jurisprudence after 1997, and how their advocacy and inputs influenced the amending of sentencing legislation in 2007.

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[282] Lonsway and Fitzgerald, "Rape Myths," 134.

4.2 Enter the Rape Myths: "Substantial and Compelling Circumstances" in Sentencing

Current research evidences police and prosecutors' reluctance to invest energy into intimate partner rape cases. The 2017 study on the investigation, prosecution and adjudication of rape cases in South Africa (RAPSSA) notes that despite the criminalisation of marital rape, prosecutors are generally unwilling to proceed with these cases.[283] Additionally, in circumstances where marital and intimate partner rapes do go to trial, the conviction rates are lower than in stranger rape cases.[284]

The six marital rape judgments reported since the criminalisation of marital rape in 1993 confirm that wives are finding protection through state mechanisms, despite the obstacles encountered amongst police, prosecutors and judges. The judgments serve as an important resource for how the rape myths that influence police and prosecutors come into play in the judicial phase. At the level of the courts, one of the points at which rape myths appear is in sentencing determinations. Here adjudicators are permitted to ascertain "substantial and compelling circumstances" that justify a departure from the prescribed minimum sentence.

Sentencing has become the arena in which archaic and destructive tropes of sexual violence are inscribed and re-inscribed, reducing prevalent forms of rape to mere trivialities. It is in sentencing determinations that subjective beliefs of judges come into full view, and where discriminatory assessments are applied, camouflaged as legal objectivity.[285] This happens despite the existence of important women's rights precedents both domestically and abroad. The domestic, comparative and international legal realms

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[283] Machisa et al., *Rape Justice in South Africa*, 31.

[284] Ibid.

[285] Modiri, "The Rhetoric of Rape," 156.

are replete with declarations of the right of women to be free from violence, to be treated equally, and the state's duty to protect women from violence.

Particularly in the 1990s, through milestones such as the Declaration on the Elimination of Violence against Women (DEVAW), and the Beijing Declaration Platform of Action (Beijing Platform), the international human rights community highlighted the subject of marital rape, and outlined states' obligations concerning violence against women.[286] From the 1980s onwards, the courts of various jurisdictions engaged in acts of judicial activism by criminalising marital rape.[287]

Though legislation swept away the marital rape exemption in South Africa, jurisprudence in the democratic era unequivocally affirms the egregiousness of sexual violence. In a series of landmark cases, the South African Constitutional Court has set out the state's obligations under the Constitution and international human rights law to protect women from gender-based violence and for the law to be developed accordingly.[288] Courts have also countered prevailing myths about rape and called for victim-centred sentencing that reflects the seriousness of the crime.[289]

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[286] Articles 1 and 2, DEVAW, Beijing Declaration, para 113(a).

[287] *R v R* (House of Lords, United Kingdom); *S v HM Advocate* (High Court of the Justiciary, Scotland); *H v H* 1999 (2) ZLR 358 (High Court, Zimbabwe); *Meera Dhungana v Ministry of Law, Justice and Parliamentary Affairs*, Re: Writ Petition No. 55 of the Year 2058. (Supreme Court, Nepal); *The People of the State of New York v Liberta* No. 597 Court of Appeals of New York 64 N.Y.2d 152; 474 N.E.2d 567; 1984 N.Y. Lexis 4916; 485 N.Y.S.2d 207.(Court of Appeals, New York); *People of the Philippines v Jumawan* G.R. No. 187495, April 21, 2014.(Supreme Court, Philippines).

[288] *S v Baloyi* 2000 (1) BCLR 86 (CC), 13; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), para 62; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).

[289] *Stephen Bryan De Beer v The State* (121/04) (Delivered on 12 November 2004) (Unreported Judgment of the Supreme Court of Appeal; *State v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010); *DPP v Thabethe* (619/10) [2011] ZASCA 186 (30 September 2011); *S v Chapman* 1997 (3) SA 341 (SCA).

At the time of the three marital rape decisions, the sentencing framework also reflected the seriousness with which rape cases should be handled. The Criminal Law Amendment Act of 1997 (Minimum Sentences Act) was enacted in response to the shockingly high levels of sexual violence in South Africa.[290] Section 51 of the Act sets out "discretionary minimum sentences" for various crimes including rape. A life sentence is imposed where the victim is raped more than once by the accused,[291] and in first offender rape cases a minimum of 10 years is prescribed.[292] The court can impose a lesser sentence where it identifies that "substantial and compelling circumstances exist" to justify doing so.[293]

The three marital rape judgments that I critique all predate the December 2007 enactment of Sexual Offences Act (SORMA), and the Amendment to the Minimum Sentences Act, which together expanded the scope of protection for victims of sexual assault and circumscribed judicial discretion in sentencing. Nonetheless, my discussion above confirms that at the time of *Mvamvu* (2005), *Modise* (2007) and *Moipolai* (2004), there was a normative framework against which adjudicators' rationales could be measured. Guided by international and comparative developments, domestic jurisprudence and legislation communicated the state's duty to take a firm position on rape.[294] Moreover, the Minimum Sentences Act of 1997 reflected the legislature's intention that rape cases be treated with sufficient gravity.

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[290] Criminal Law Amendment Act 105 of 1997; Julia Sloth-Nielsen and Louise Ehlers, "Assessing the Impact: Mandatory and Minimum Sentences in South Africa," *South African Crime Quarterly* 14 (2006); Kubista, "Substantial and Compelling Circumstances," 77.

[291] Section 51(1) pertaining to life sentences refers to crimes in Part I of Schedule 2 of the Minimum Sentences Act. The relevant provision (pertaining to multiple rapes) is contained in subsection (a)(i) under the section for aggravated rapes.

[292] Section 51(2)(b)(i) refers to Part III of Schedule 2 for cases of rape.

[293] Section 51(3)(a).

[294] For example the Minimum Sentences Act, the DVA, *S v Chapman*; *S v Baloyi and Others*; *Van Eeden v Minister of Safety and Security*.

4.3 Complicating Rape Myths and their Impact on Attrition in South Africa

I approach my assessment of the marital rape judgments from the premise that rape myths are at play in the discourse, but do so critically, heeding the literature on rape myths which discourages the use of stereotypes as singular explanations for rape case outcomes.[295] Scholarship on rape myths and their acceptance in societies has evolved considerably, growing from early feminist agitations against rape stereotypes.[296] Pioneering rape myth studies gave rise to the notion of the "real rape" template, and observations that cases that deviate from the stereotyped caricature of a rape were less likely to lead to successful outcomes in the criminal justice system.[297]

A theoretical finetuning of the earlier rape myth acceptance scholarship has integrated more situational and contextual factors into analyses.[298] The evolving literature demonstrates that simplistic rape myth studies often fail to produce "robust conclusions" about the correlates and determinants of rape myth acceptance amongst certain

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[295] Diana Payne, Kimberly Lonsway, and Louise Fitzgerald, "Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale," *Journal of Research in Personality* 33, no. 1 (1999); Conaghan and Russell, "Rape Myths," 31-33; Gerger et al., "The Acceptance of Modern Myths," 423; Smythe, *Rape Unresolved*; Lonsway and Fitzgerald, "Attitudinal Antecedents."

[296] Schwendinger and Schwendinger, "Rape Myths."; Brownmiller, *Against Our Will.*

[297] The stereotype of a real rape is rooted in androcentric notions of what rape is and how it plays out. It envisions a 'sympathetic' rape victim as a woman who is 'respectable' and sexually conservative, and who is brutally raped by a stranger who inflicts grievous physical injury upon her. It is also presumed that the victim should have fought her assailant throughout the attack. See Estrich, *Real Rape*; Adler, *Rape on Trial*; Lisa Frohmann, "Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections," *Social Problems* 38, no. 2 (1991).

[298] Gerger et al., "The Acceptance of Modern Myths."; Lonsway and Fitzgerald, "Attitudinal Antecedents."; Lonsway and Fitzgerald, "Rape Myths."

populations.[299] Scholars have accordingly illuminated that rape myths are not unchanging but are bound up with social and cultural mores. Despite parallels and continuities, myths function differently in each society and era, and consequently empirical probing is better suited for assessing them.[300]

It is within the more nuanced tradition of rape myth scholarship that Conaghan and Russell warn that rape myths not be regarded as "consciously-held views of cognitively deliberative subjects" but as "culturally prevalent tropes and images" that are "normatively infused."[301] "Culture" is a word that will feature significantly throughout this chapter and the subsequent chapters of this dissertation. For my discussions within this chapter, my use of the word culture loosely refers to hegemonic norms and practices, but with understanding that there is diversity and continuous change in cultural expressions, and that peripheral cultures exist alongside hegemonic ones.

Lonsway and Fitzgerald's work re-configured the idea of rape myths to incorporate culture, distilling the definition of myth into three elements: "(1) false or apocryphal beliefs that (2) explain some cultural phenomenon and (3) whose importance lies in maintaining existing cultural arrangements."[302] And so, as Payne, Lonsway and Fitzgerald later expound, "the importance of rape myths lies not in their ability to truthfully characterize any particular instance of sexual violence."[303] In contrast, the salience of rape myths stems from their "overgeneralized and shared nature as well as their specified psychological and societal function."[304]

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[299] Payne, Lonsway, and Fitzgerald, "Rape Myth Acceptance," 29.

[300]Conaghan and Russell, "Rape Myths," 31-33; Gerger et al., "The Acceptance of Modern Myths," 423; Bohner et al., "Rape Myth Acceptance."

[301] Conaghan and Russell, "Rape Myths," 39.

[302] Lonsway and Fitzgerald, "Rape Myths," 134.

[303] Payne, Lonsway, and Fitzgerald, "Rape Myth Acceptance," 30.

[304] Ibid.

The critical scholarship on rape myths consistently reorients the inquirer to be attuned to cultural mores and societal particularities. It creates a more intricate picture of how cases make their way through the criminal justice system. Smythe's empirical research on police discretion in eight South African jurisdictions typifies the point that how cases proceed is shaped by a unique interplay of factors. Although there are "echoes of old stereotypes" amongst police, rape myth theories can only go so far in capturing local South African attrition dynamics.[305] The RAPSSA study, which is broader in scope than previous large-scale attrition studies, determined that older and male investigating officers ascribed to rape myths more than others.[306] Further it uncovered instances where prosecutors and judges relied upon rape myths and showed gender insensitivity.[307] Aside from rape myths, the study cites numerous factors along the criminal justice chain that determine the outcome of cases.[308]

The recent South African studies establish that it is not a question of whether rape myths influence actors' choices, for they do. The import of the later rape attrition and adjudication studies is that there are other determinative elements of rape cases which reveal much about the society in question. In South Africa, women who are raped face enormous hurdles in seeking justice, of which rape myths form only a part. Yet, because rape myths still have applicability, there is room for examining their functioning and meanings, adhering to the locally-oriented and nuanced paradigms established by updated rape myth studies. Per Lonsway and Fitzgerald's work, in the following sections I extract the "cultural arrangements" the rape myths support in South Africa. Rape myths are not anomalous but instead representative of societal norms, and these transgress the

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[305] Smythe, *Rape Unresolved*, 196.

[306] Machisa et al., *Rape Justice in South Africa*, 14-15, 72-74.

[307] Ibid., 99, 105-06

[308] Ibid., 107, 14-15. The factors identified by the study include: lack of police emotional investment in arresting perpetrators, substandard police training, low police morale, the police's erroneous assessment of which cases are "severe," the existence of corroborating evidence, prosecutors selectively proceeding with cases based on a desire to meet performance measures, and the time-consuming nature of investigating and preparing cases.

imagined boundaries between accused and judge. I utilise neutralisation theory to make this link apparent.

4.4 An Introduction to Neutralisation Theory and Feminist Perspectives

In this section I look at the main concepts that feed into neutralisation theory: disavowal techniques, vocabularies of motives, accounts, and techniques of neutralisation. I also include feminist literature on neutralisation theory which depicts how the language legitimising rape is drawn from culturally-approved vocabularies. In this sense, the discourse of rapists is in fact reflective of social norms, as opposed to violating norms. There is scant scholarship on the application of neutralisation theory to judicial language. Anderson and Doherty's analysis of rape vocabularies of motive across different contexts in the United Kingdom, including court trials, is one of the few examples.[309] Chennells also briefly refers to vocabularies of motive in her study of myths in South African rape trials.[310]

On the whole, where state actors are concerned, studies have generally looked at instances where they committed criminal or unethical behaviour.[311] Though the judges in the three cases I consider do not engage in judicial misconduct per se, they employ rape stereotypes that are shared by criminals and non-criminals alike. Following the example set by the feminist scholarship of Anderson and Doherty, I employ a neutralisation theory framework to show how rape myths burgeon across all sectors of society.

There are recurrent devices that play out in defences of rape. A rapist may say that the woman deserved to be raped, or that he believed that she had consented to sex, or

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[309] Irina Anderson and Kathy Doherty, *Accounting for Rape: Psychology: Feminism and Discourse Analysis in the Study of Sexual Violence* (London, New York: Routledge, 2007).

[310] Chennells, "Sentencing: The Real Rape Myth," 34.

[311] Heather Schoenfeld, "Violated Trust: Conceptualizing Prosecutorial Misconduct," *Journal of Contemporary Criminal Justice* 21, no. 3 (2005): 257-58; Petter Gottschalk, "Police Criminality and Neutralization: An Empirical Study of Court Cases," *Police Practice and Research* 13, no. 6 (2012).

perhaps he was too drunk or high to be able to control his sexual urges. And after all, no real harm was done. For intimate partners, the perpetrator may contend that because he had had consensual sex with his partner on numerous occasions, this time was no different. He was simply taking what he believed he was entitled to. The woman in a mini skirt who accepted a drink at the bar, or a lift home, was clearly asking to be raped. Then there are those women who cannot be raped: the prostitutes, loose women, women whose skin is darker, and women who come from poverty.

The tired clichés of rape have real consequences. They result in men being acquitted for rape, or receiving lighter sentences. They cause secondary victimisation for women seeking justice. They position men as uncontrollably sexed-beings whom the law will find ways to protect, while women must take the blame for their own victimisation. These linguistic rationalisations work because society allows them to. Neutralisation theory bears significance for conceptualising how rape myths operate and are borne from culture.

Neutralisation theory is decades old, and scholars have applied it broadly in different disciplines outside of sociology. The theory has been stretched, remoulded and repurposed, and also stagnated, to the extent that the Maruna and Copes survey and critique of neutralisation theory over the past five decades is one hundred pages long.[312] Given the infinite breadth and gradual expansion of neutralisation theory, I focus exclusively on its foundational components that are relevant to the subject of rape myths, beginning with the work of Mills.

In the 1940s Mills created the term "vocabularies of motive" to describe "socially established vocabularies, culturally learned and readily available, to be used as soon as the situation required rationalization."[313] Under this rubric, following the commission of an act that is branded as deviant or criminal, the guilty actors – attuned to socially acceptable

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[312] Shadd Maruna and Heith Copes, "What Have We Learned from Five Decades of Neutralization Research?," *Crime and justice* 32 (2005).

[313] Mills, "Situated Actions."; John Hamlin, "The Misplaced Role of Rational Choice in Neutralization Theory," *Criminology* 26, no. 3 (1988).

scripts – will explain their behaviour to fall in line with what society deems appropriate. The outcome of this is that the harmful act is legitimated and the harm to the victim neutralised. Motives are, in simple terms, "accepted justifications for present, future, or past programs or acts."[314]

Building on Mill's construct, sociologists developed related frameworks for the linguistic devices used in response to deviant acts. In 1957 Sykes and Matza introduced "techniques of neutralisation" which are the various motives and rationalisations that "delinquents" reference.[315] In the same fashion as vocabularies of motive, techniques of neutralisation such as "denial of injury" and "denial of the victim," allow for accused perpetrators to bolster their claims with culturally sanctioned language. This exercise brings so-called deviant or criminal behaviour into the realm of the acceptable.

A decade after Sykes and Matza's research, Scott and Lyman incorporated the notion of "accounts," linguistic devices used whenever acts are exposed to "valuative inquiry."[316] They categorised two forms of accounts: excuses and justifications, both being "socially approved vocabularies that neutralize an act or its consequences when one or both are called into question."[317] Scott and Lyman define justifications as accounts in which the actor attempts to place their actions in an affirmative light, and deny the negative connotations of what they have done.[318] Sykes and Matza's techniques of neutralisation represent justifications.[319] On the other hand, excusers admit that their actions are improper but refuse to take responsibility; their excuses are based upon "appeals to accident, or biological drive, or through scapegoating."[320]

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[314] Mills, "Situated Actions," 907.

[315] Sykes and Matza, "Techniques of Neutralization."

[316] Scott and Lyman, "Accounts."

[317] Ibid., 57.

[318] Ibid., 47.

[319] Ibid., 51.

[320] Scully and Marolla, "Convicted Rapists'," 530; Scott and Lyman, "Accounts," 47.

In my review of how disavowal techniques manifest in marital rape judgements, justifications are more frequently asserted than excuses. As a whole, the seminal neutralisation studies signify that defences put forward by criminals are not the product of individual repertoires but are absorbed from social cues and conditioning. They shift the inquiry of rape myths from "why" such myths are propounded, to "how" they come into being.[321]

Feminist sociologists have applied the theories of Mills, Sykes and Matza, and Scott and Lyman to the context of rape, to illuminate how the neutralisation techniques are relied upon by rapists. Though the terminology varies, "neutralisation techniques," "accounts" and "vocabularies of motives" all refer to "social explanations" for behaviour that is subjected to judgment.[322] Rape myths are an embodiment of these neutralising mechanisms, for they produce a "cultural scaffolding of rape," as Gavey terms it, minimising the blameworthiness of men's sexual aggression.[323] Rape myths are part of the social world, and so are a reflection of broader culture. The stereotypes of rape are not idiosyncratic. Instead they typify commonly sanctioned models of heterosexual relations.

Writing in the 1970s, Jackson was one of the earliest feminist scholars to apply neutralisation theory to sexual violence for the purpose of theorising how "rape was possible."[324] Combining Mills, Sykes and Matza's research with Gagnon and Simon's sexual scripts theory, Jackson postulated that ostensibly "normal" sexual behaviour and "deviant" acts are in actuality motivated by the same vocabulary of motives.[325] She asserts that "it may be argued that it (rape) not only demonstrates male dominance but serves to

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[321] Mills, "Situated Actions," 906.

[322] Anderson and Doherty, *Accounting for Rape*, 21.

[323] Ibid.; Nicola Gavey, *Just Sex?: The Cultural Scaffolding of Rape* (East Sussex: Routledge, 2013).

[324] Stevi Jackson, "For A Feminist Sociological Imagination: A Personal Retrospective on C. Wright Mills" in *The Anthem Companion to C. Wright Mills*, ed. Guy Oakes (London: Anthem Press, 2016), 167-68.

[325] Jackson, "The Social Context," 30; John Gagnon and William Simon, *Sexual Conduct: The Social Origins of Human Sexuality* (Chicago: Aldine, 1973).

preserve it."[326] Under this paradigm, rape is reformed as an exaggerated manifestation of accepted interactions between men and women, rendering the popularity of rape myths explicable.

Scully and Marolla's empirical research is another foundational feminist intervention in the area of neutralisation theory and sexual violence. Through their interviews with convicted rapists, Scully and Marolla concluded that "(m)en who rape need not search far for a cultural language which supports the premise that women provoke or are responsible for rape."[327] This conclusion is derived from the feminist presumption that rape does not arise from individual psychological illness but mirrors social norms.[328]

In their evaluation of cultural definitions of rape, Stewart, Dobbins and Gatowski found that the import of neutralisation techniques as applied to sexual violence is that the use of the techniques transcends different social positions, meaning that such myths are held widely and are powerful.[329] Lending support to the feminist literature, the results of Bohner et al.'s experiments on rape myth acceptance amongst German university students deduced that rape myths do serve a neutralising function.[330] I now turn to the South African cases to document the operation of two techniques of neutralisation in the context of marital rape: denial of the victim and denial of injury.

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[326] Jackson, "The Social Context," 37.

[327] Scully and Marolla, "Convicted Rapists'," 534.

[328] Jackson, "The Social Context," 29; Scully and Marolla, "Convicted Rapists'," 542.

[329] Mary White Stewart, Shirley A Dobbin, and Sophia I Gatowski, "'Real Rapes'" and 'Real Victims': The Shared Reliance on Common Cultural Definitions of Rape," *Feminist Legal Studies* 4, no. 2 (1996): 172-73.

[330] Gerd Bohner et al., "Rape Myths as Neutralizing Cognitions: Evidence for a Causal Impact of Anti-Victim Attitudes on Men's Self-Reported Likelihood of Raping," *European Journal of Social Psychology* 28, no. 2 (1998): 266.

4.5 Neutralising Language: Marital Rape Case Sentencing Determinations

4.5.1 Denial of the Victim

The technique of denial of the victim is a dehumanisation mechanism. It is most easily leveraged against populations whose interests are not represented in elite circles, and who are historically disadvantaged based on race, gender, ethnicity, language and/or class. The technique of denying the victim consequently exposes the insidious inequalities and cleavages of societies. It brings to light the groupings of citizens who are accorded more dignity and protections. For the marital rape cases, it is women and specifically Black and rural women whose humanity is erased. *S v Mvamvu*, a 2005 decision of the SCA stands as possibly the most worrying and detrimental example of jurisprudence on marital rape given that the SCA is the second highest court in South Africa after the Constitutional Court. The judgment displays the denial of victim technique through a reliance on tropes of Black rural culture and marital rape.

In *Mvamvu* the SCA found that the marital relationship, in conjunction with the appellant's cultural (read: Black, rural and impoverished) background, were strong mitigating factors.[331] Khehlani Mvamvu had twice abducted his estranged customary law wife and raped her eight times on these two separate occasions. At the time of the attacks, the wife was living apart from her husband whom she had married according to custom when she was only 15 years old. She had moved away from him as she was unhappy in the marriage, and believed that their marriage was over. As the *lobola* had not been returned to his family, the husband testified that he believed that he and the victim were still married. The wife had clearly been distressed by her husband's behaviour prior to the abductions and rapes. When *Mvamvu* first kidnapped her, she had just obtained a restraining order against him and was returning from court.

[331] *S v Mvamvu* paras 15-16.

Under the Minimum Sentences Act, multiple rapes of the victim by an offender carry a life sentence.[332] In *Mvamvu* the Court did find that the sentences imposed by the Magistrate's court were inappropriately low, but it determined that the appellant's offences did not warrant a life sentence based on the mitigating factors of his rural outlook and belief that he was still customarily married to the complainant. The import of *Mvamvu* is that there is a different standard for rural litigants married according to custom; and the SCA's language makes plain that the application of the law can bolster and reproduce gender stereotypes that uphold patriarchal values.

The Court expends energy in rationalising the actions of the husband. It states that it is "clear from his evidence that at the time of the incidents the accused honestly (albeit entirely misguidedly) believed that he had some right to conjugal benefits." Resting upon racial stereotypes, the Court continues: "His actions, though totally unacceptable in law, might well be (albeit only to a limited extent) explicable given his background. He grew up and lived in a world of his own, of tradition and Black medicine which was not completely strange to the complainant (they grew up together and come from the same area)."[333]

The symbolism of the court's reasoning is that the violence of men who have grown up in a world of "tradition and Black medicine" is understandable; and the women who grow up with and marry traditional men are (or should be) acclimated to violent male dominance. The Court further opines that the husband's purpose in raping and kidnapping was "to subjugate the complainant to his will and to persuade her to return to him – a consequence of male chauvinism, perhaps associated with traditional customary practices… These ingrained traits and habits of the accused cannot be ignored when considering an appropriate sentence."[334]

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[332] Criminal Law Amendment Act 105 of 1997.

[333] *S v Mvamvu* para 16.

[334] Ibid., para 16.

On this rationale, Black women from rural areas and in traditional marriages should expect less in terms of how they are treated by their male partners and what protection a court will offer when they can no longer withstand abuse. Speaking to the parameters of the denial of the victim technique, Scully and Marolla clarify that even where the perpetrator takes responsibility for their actions, "the moral indignation of self and others may be neutralized by an insistence that the injury is not wrong in light of the circumstances… rather it is a form of rightful retaliation or punishment."[335] As *Mvamvu* denotes, the denial of the victim technique reconfigures rape as a utilitarian tool. The husband had a reason for raping his wife; he simply wanted her to come back home. The rapes are only the inconsequential symptoms of a husband exercising his valid authority over his wife. The fact of the wife's race also places her at disadvantage, for one of the legacies of institutional racism is that historically, Black women have been branded as unrapeable.[336]

In this series of cases, the judges' denial of the victims is inexorably tied to their perceived subordinate status as wives. The *S v Modise* appeal concerned the sentence handed down by the court *a quo*. The regional court had imposed a sentence of five years for attempted rape of a wife by her husband, in order to reflect the gravity of the offence as well as the accused's previous assault conviction. At the time of the attempted rape, the couple had been separated for a year and were in divorce proceedings. The High Court of the Bophuthatswana Provincial Division overturned the sentence handed down by the Magistrate's Court. Justice Mogoeng (now Chief Justice of the Constitutional Court) and Justice Gura reasoned that the facts of this case were far less serious than in *Mvamvu*; moreover, "the relationship between the complainant and the appellant seems to have played no role in the exercise of the Magistrate's discretion" and "this relationship, of husband and wife, should never be overlooked by any judicial officer."[337]

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[335] Sykes and Matza, "Techniques of Neutralization," 668.

[336] Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York, Oxford: Oxford University Press, 1997).

[337] *S v Modise.*

It appears that the esteemed justices neglected to recall that the marital rape exemption had been removed from law in order to accord wives more protection, not less. But such is the function of the denial of victim technique that groups of people – in this case wives – are deemed to deserve injury.[338] In *Modise*, the husband and wife relationship was a decisive factor in the Court's determination that the crime was not serious. The judgment reads:

> This is a man whose wife joined him in bed, clad in panties and a nightdress. When life was still normal between them, they would ordinarily have made love. The appellant must, therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behaviour. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance.[339]

Building upon the problematic precedent set by *Mvamvu*, here rape is imagined as a necessary and justifiable means of forcing wives to submit to their conjugal duties. The justifications asserted by the courts are "buttressed by the cultural view of women as sexual commodities, dehumanized and devoid of autonomy and dignity."[340] Women exist to satisfy the sexual appetites of men. Hence, a man's desire to "make love" renders rape a sexual act, not one of sheer violence and the result of unequal power relations.

The 2004 case *S v Moipolai*[341] is the other Justice Mogoeng decision that implicates marital rape (common law husband and wife) and displays the same flagrant disdain for (common law) wives in terms of sentencing. It is decisions like *Modise* and *Moipolai* that prompted an outcry from civil society when Mogoeng was nominated as Chief Justice of the Constitutional Court in 2011, as he had repeatedly revealed an astonishing disregard

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[338] Sykes and Matza, "Techniques of Neutralization," 668.

[339] *S v Modise* para 19.

[340] Scully and Marolla, "Convicted Rapists'," 542.

[341] *S v Moipolai.*

for the rights of victims of sexual violence.[342] In *Moipolai* a woman was assaulted and raped by her common law husband when she was eight months pregnant with their third child. The rape took place in the presence of another woman whom the husband was having an affair with. Justice Mogoeng made clear that he viewed the complainant's account as credible and affirmed the conviction for rape, but it is in the matter of sentencing that the Court neutralised the victim.

After considering the aggravating factors in the case (for example, the accused punching his common law wife so hard that she fell over, and raping her in the presence of another woman after having beaten her up), Justice Mogoeng then reasoned: "These factors though admittedly aggravating were, however, overemphasised at the expense of equally strong mitigating factors."[343] In his opinion, some of the "equally strong" mitigating factors were as follows:

> …the Appellant and the Complainant were no strangers to one another. They were lovers (virtually husband and wife) for a period of seven years…But for the presence of Matron, the Appellant and the Complainant would probably, just as they did many times before, have had consensual intercourse….Complainant must have come knowing that this was either likely to happen or was going to happen for sure and she was, given the nature of their relationship, willing to take part in the intercourse.[344]

Mogoeng fixedly continued along this trajectory, deducing that "(t)his rape should, therefore, be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable."[345] To provide support for his contention that the marriage-like relationship was a strong mitigating factor, Mogoeng cited *dicta* from a *pre*-PFVA 1988 Appellate Division case where the friendship between the

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[342] COSATU, *COSATU Submission on the Nomination of Justice Mogoeng Mogoeng for the Post of Chief Justice* (Johannesburg: Congress of South African Trade Unions, 3 September 2011), http://www.cosatu.org.za/docs/subs/2011/submission0905.html.

[343] *S v Moipolai* para 22.

[344] Ibid., paras 23-24.

[345] Ibid., para 24.

perpetrator and victim was found to be a "mitigating factor in that the shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim."[346] According to Mogoeng's line of thinking, because the Appellate Division had been "understanding and even lenient in a case where a man had raped his friend," this permitted that he be even more forgiving towards an intimate partner.[347] He reasoned too that for the complainant and accused, "theirs was not an abusive relationship" and the violence on that day of the crime was "in fact a single aberration."[348]

Mogoeng subscribes to a host of erroneous ideas about intimate partner rape. He again positions the woman as a sexual object, who, by virtue of her being in a relationship, gives ongoing consent to sex. Here, the vocabularies of motive applicable to conventional sexual situations are stretched to encompass acts of rape, thereby allowing the rapist, and those evaluating the rapist's behaviour, to perceive his acts as legitimate.[349] The judge and rapist thus speak the same language, and in the process the victim's dignity and perspectives are rendered invisible.

4.5.2 Denial of Harm

One of the most enduring and damaging misconceptions about rape is that it is not an inherently violent act. This misconception unfailingly emerges in jurisprudence and rape defences within South Africa. Smythe's investigation of the outcome of rape cases affirms that "the threshold of what constitutes 'real rape' will be different in contexts where the cultural and normative dimensions of appropriate sexual conduct are more accepting of violence and coercion."[350] In a society such as South Africa, steeped in violence, militarisation and struggle, adjudicators have become desensitised to even the most severe of rapes. This leads to finding after finding that unspeakable forms of sexual

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[346] *S v N* [1988] 1 All SA 363 (A) 377(2).

[347] *S v Moipolai* para 24.

[348] Ibid., para 25.

[349] Jackson, "The Social Context," 30.

[350] Smythe, *Rape Unresolved*, 82.

violence against women and girls (VAWG) do not result in significant harm.[351] Discourse that ignores the immeasurable trauma of rape is the quintessential manifestation of the "denial of injury" neutralisation technique.

When denial of injury is invoked, it signals that the persons who were injured do not merit justice; that they belong to a class of people who do not have a right to maintain that they have been hurt.[352] One of the patterns recorded by Scully and Marolla through their interviews with convicted rapists in the United States is that the men appealed to denial of injury arguments, even when they had used weapons to perpetuate the rape.[353] From their point of view, "(a)s long as the victim survived without major physical injury, from their perspective, a rape had not taken place."[354]

Rape is a highly gendered crime. Under written law and in the application of the law, what is designated as rape mirrors the normative bounds of sexual relationships between men and women. The line between rape and "normal" sex is constantly shifting and being renegotiated, but this is largely on men's terms. Whether a sex act is a crime or not is dependent upon "a particular hegemonic construction of woman's sexuality, the boundaries of which are largely defined and negotiated through the medium of rape myths."[355] Consequently, a man's conception of sex normally triumphs, secured by safeguards designed to discredit women's claims to rape. When a court declares that a rape victim did not suffer real harm, it is because it speaks from a male-centric position.

Courts continuously reassert that for a rape to be serious it must be accompanied by extreme physical injuries, as though rape in itself is not an injurious violation.[356] This discourse is brought in during the sentencing phase where the Court can find mitigating

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[351] Ibid.

[352] Scott and Lyman, "Accounts," 51.

[353] Scully and Marolla, "Convicted Rapists'," 535.

[354] Ibid.

[355] Conaghan and Russell, "Rape Myths," 39.

[356] Kubista, "Substantial and Compelling Circumstances," 77, 83, 85.

circumstances to justify a departure from the mandatory sentences prescribed by law. The rape sentencing determinations are often in themselves acts of violence for they employ neutralising language. Ultimately, they "constitute justifications for violence which has already occurred or which is about to occur," and when the adjudicators "have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."[357] I now turn again to the three problematic marital rape cases to document the application of the denial of injury mechanism in the marital rape context.

I commence with *Mvamvu* since the language is replete with gender, class and race stereotypes. Although the customary law wife had been raped eight times during two kidnappings, the Court declared: "There was no evidence that the complainant suffered any lasting psychological trauma to speak of, although she did mention in her evidence that she still thought about the incidents."[358] It subsequently resolved that she had endured only "minor" injuries.[359] Displaying both a disregard for the victim herself and her injuries the Court rationalised the husband's violent behaviour through racialised cliché:

> His actions were shaped and moulded by the norms, beliefs and customary practices by which he lived his life. Though the rapes were accompanied by some acts or threats of violence, it does not appear that the prime objective was to do the complainant harm…He wanted the complainant back home, as his wife – in one piece. The threats he made were empty, albeit designed to frighten her.[360]

It is perplexing that the Court concludes that eight rapes and two kidnappings are "empty" threats that have a noble purpose. The arbiters can do so because they sit comfortably within the reassuring confines of male privilege, blind to the further injury caused by their reasoning. Here, we see how when rape is "viewed as a male entitlement" it is "no longer

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[357] Robert Cover, "Violence and the Word," *Yale Law Journal* 95, no. 8 (1986): 1601.

[358] *S v Mvamvu* para 15.

[359] Ibid.

[360] Ibid., para 16.

seen as criminal."[361] Like the rapists in Scully and Marolla's study who used justifications, the *Mvamvu* language provokes the conclusion that men have raped because "their value system provided no compelling reason not to do so."[362] Mvamvu was merely an overzealous traditional husband who desperately wanted his wife back, and cannot really be faulted for raping and kidnapping her.

In *Modise*, the attempted rape case, the Court too found that the wife did not suffer any real injuries. It recounted: "It is true that the complainant was injured, outside the house when she fell, but the appellant himself did not inflict any injury on her directly. He never chased after her. No real harm or injuries resulted from the throttling."[363] The Court believed that the attack did not even warrant a prison sentence, especially since the parties were married. It averred that this "case is not comparable to a case where a lady comes across a stranger on the street who suddenly attempts to rape her."[364]

The courts' attitudes in *Mvamvu* and *Modise* further encapsulate the salient point made by Smythe that South African society has become inured to such appalling levels and forms of violence that it is exponentially harder for rapes to be viewed as serious.[365] Smythe writes that "high levels of violence and weapon use are no longer useful in thinking about what constitutes 'real rape'. There is simply too much violence perpetrated on women's bodies confronting the criminal justice system every day for all but the most egregious to register."[366] In *Mvamvu*, the wife was abducted for three days, during which time her husband raped her six times. During the second incident, armed with a knife, he dragged her to a bush where he raped her twice and hit her twice on her thigh with a stick. Yet, the court found that both her psychological and physical injuries were negligible. It is no wonder then, that in *Modise* and *Moipolai*, where *only* "minimum force" was used to

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[361] Scully and Marolla, "Convicted Rapists'," 542.

[362] Ibid.

[363] *S v Modise* para 22.

[364] Ibid.

[365] Smythe, *Rape Unresolved*, 196.

[366] Ibid.

assault the victims and "no real harm" resulted, the crimes hardly rattled the consciences of the courts.[367]

4.6 The Aftermath: Feminist Interventions in South Africa's Sentencing Framework

The Minimum Sentences Act was amended in 2007 to limit adjudicators' discretion in making mitigation assessments. The 2007 Amendment stipulates that when "imposing a sentence in respect of the offence of rape" certain factors "*shall not* constitute substantial and compelling circumstances justifying the imposition of a lesser sentence" [emphasis added].[368] These include "(iii) an accused person's cultural or religious beliefs about rape" and "(iv) any relationship between the accused person and the complainant prior to the offence being committed."[369] The amendments are a response to rape myths, such as the ones featured in *Mvamvu*, *Modise* and *Moipolai*, that continued to surface in rape judgments following the passage of the Minimum Sentences Act.

Though the Amendment does not specifically cite marital rape, the subject of rape in marriage featured in the feminist advocacy that led to the limitations on discretion, and even Parliamentary debates right before the enactment of the Amendment. The intervening years between 1997 and 2007 evince that notwithstanding its criminalisation, some lawmakers and judges still perceived marital rape as a lesser crime. Without the consistent vigilance of women's rights groups, the 2007 Amendment would not have come into being.

At the time of its enactment, the Minimum Sentences Act met with palpable hostility from members of the judiciary.[370] It was subjected to constitutional challenges but

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[367] *S v Modise* para 19.

[368] Criminal Law (Sentencing) Amendment Act 38 of 2007.

[369] Section 51(3)(a A).

[370] *S v Malgas* 2001 (2) Sa1222 (SCA), para 1; Kubista, "Substantial and Compelling Circumstances," 77.

survived these.[371] Addressing fears amongst the judiciary that the Minimum Sentences Act stripped them of their discretionary powers, the SCA in *S v Malgas* affirmed that adjudicators still have discretion, but cautioned that the prescribed sentences should not be "departed from lightly and for flimsy reasons."[372] While *Malgas* lays out what has been cast as a "practical method" for applying the "substantial and compelling circumstances" provision of the Act, it also arguably contradicts the ethos of the legislation.[373] The judgment states that adjudicators may continue to use factors that have "traditionally" been used in sentencing determinations, and that none are excluded.[374]

In the wake of *Malgas*, the SCA's decision in *S v Abrahams* epitomises the damaging standards that courts have set for measuring the seriousness of rape. There the Court declared that "some rapes are worse than others" and proceeded to conclude that the case at hand, in which a father had raped his 14-year-old daughter, was not an example of the worst form of rape.[375] Per the example set by *Abrahams* and other judgements, what ensued in the decade following the passage of the Minimum Sentences Act were a series of myth-laden decisions about rape. Feminist scholars strongly criticised the litany of decisions, particularly child rape cases in which courts concluded that the crimes were not serious, and that the victims suffered no significant trauma.[376]

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[371] *S v Dodo* 2001 1 SACR 594 (CC) , in which the Constitutional Court upheld the validity of section 51(1) of the Act, which prescribes life sentences for rape and murder under certain circumstances; *S v Malgas* - here the Supreme Court of Appeal reassured judges of their ability to continue to use discretion in sentencing determinations, despite the mandatory minimums set out by the Act.

[372] *S v Malgas* paras 25A, 25D.

[373] *S v Dodo* para 11.

[374] *S v Malgas* para 25F.

[375] *S v Abrahams* 2002 (1) SACR 116 (SCA), [2002] JOL 9263(A), para 29.

[376] Kubista, "Substantial and Compelling Circumstances," 81-85; Baehr, "Mandatory Minimums," 234-37; Hoffman-Wanderer, "Sentencing," 224-41; Chennells, "Sentencing: The Real Rape Myth," 27-33.

In addition to *Abrahams*, in *S v Ntuli*, where a man had raped a 14-year-old girl on multiple occasions, the Court stated that it is "fortunate for the accused that the evidence in this case indicates that the complainant has suffered no emotional disturbances or ill-effects as a result of her experience, and that she suffered no serious injuries."[377] In *Ntholeng v S*, which involved a serial child rapist, the Court reasoned: "All of the complainants did not sustain any physical injuries other than those incidental to forced penetration and even those were not of a serious nature."[378] There are myriad other examples.[379]

The South African courts created what Kubista has termed a "false benchmark standard" for ascertaining the gravity of the crime.[380] Exposing an uncritical adherence to stereotypes and a desensitisation to the extreme violence pervading South Africa, judges have wielded their discretion carelessly, crafting new and problematic standards of what rapes are serious and what rapes are not. Women's rights and feminist civil society groups and scholars decried the deleterious precedents set by the courts in the first decade after the Minimum Sentences Act came into force.[381] *Mvamvu* in fact provoked considerable ire amongst commentators who lambasted the Court's deference to rape and cultural stereotypes.[382]

The Minimum Sentences Act was not intended to be permanent, and thus was subjected to review every two years after 1997. In the face of mounting evidence of the

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[377] *S v Ntuli*.

[378] *Ntholeng v S*.

[379] See *S v Njikelana* 2003 (2) SACR 166 (C); *S v Mabomotsa* 2002 (2) SACR 435 (SCA); *S v Gqamana* 2001 (2) SACR 28 (C); *S v Motaung* (ECJ 079/2005) [2005] ZAECHC 33 (19 October 2005).

[380] Kubista, "Substantial and Compelling Circumstances," 83.

[381] Western Cape Consortium on Violence against Women (WCC), *Submission to the Minister of Justice and Constitutional Development in response to the evaluation of the Criminal Law Amendment Act 105 of 1997* (4 March 2005); Baehr, "Mandatory Minimums," 234-37; Kubista, "Substantial and Compelling Circumstances."; Modiri, "The Rhetoric of Rape."

[382] Baehr, "Mandatory Minimums," 236; Modiri, "The Rhetoric of Rape," 157; WCC, *Submission*; Yebisi and Balogun, "Marital Rape," 547; Hoffman-Wanderer, "Sentencing," 231.

courts' disregard for rape crimes, feminist groups lobbied for an amendment to the Act that would restrict judges' ability to rely on rape myths, and their recommendations ultimately shaped the 2007 Amendment to the Act.[383] The new restrictions on "substantial and compelling circumstances" in section 51 of the amended Act are actually taken from the Western Cape Consortium on Violence Against Women's 2005 submission to the Minister of Justice and Constitutional Development.[384]

Of the nine factors that the Consortium recommended for exclusion as substantial and compelling circumstances, the Amendment incorporated four: the complainant's previous sexual history; apparent lack of physical injury to the complainant; the accused person's cultural or religious beliefs about rape; and any relationship between the accused person and the complainant.[385] The five remaining issues noted by the Consortium that were left out of the Act are: an accused's use of intoxicating substances prior to the assault; an accused's lack of intention to cause harm to the complainant in committing the rape; an accused's lack of education, sophistication or a disadvantaged background; a lack of "excessive force" used to perpetrate the rape; and a lack or apparent lack of psychological harm to the complainant.[386] The Consortium cited *Mvamvu* in support of the factors of the accused's cultural beliefs, and the accused's lack of intention to cause harm to the victim.[387]

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[383] For an overview of this process, see Tshwaranang Legal Advocacy Centre, Rape Crisis Cape Town Trust, the Women's Legal Centre, People Opposing Women Abuse, OUT LGBT Well-Being, Resources Aimed at the Prevention of Child Abuse and Neglect, and the Centre for Applied Legal Studies. *Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development: The Criminal Law (Sentencing) Amendment Bill* (15 June 2007).

[384] Sloth-Nielsen and Ehlers, "Assessing the Impact," 17-18; Briefing Note: Criminal Law (Sentencing) Amendment Bill, [B 15 – 2007], Department of Justice, 11 June 2007. http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/070612briefing.htm.

[385] See Section 51(3).

[386] As listed in Sloth-Nielsen and Ehlers, "Assessing the Impact," 17-18.

[387] Ibid., 18, 21.

Women's and gender rights groups again raised concerns in 2007 when the Amendment was being considered. The coalition, made up of activist and academic organisations, cited the factors set out by the Western Cape Consortium in 2005, and raised concerns about the myths that adjudicators relied upon in sentencing determinations.[388] In the end, the Department of Justice responded to the submissions and, with the passage of the 2007 Amendment, ultimately placed restrictions on what factors could be taken into account as substantial and compelling circumstances.

Amidst the progress made by women's rights groups, murmurings reminiscent of the marital rape exemption era emerged. During the legislative review process of the Amendment Bill, one lawmaker shared misgivings about treating marital rape the same as other rapes. When the Department of Justice briefed the Justice and Constitutional Development Portfolio Committee on the Sentencing Amendment Bill, Adv L Joubert (Democratic Alliance) suggested that the relationship between husband and wife be retained as a mitigating factor.[389] The Chairperson, Ms F Chohan-Khota (African National Congress) and Ms Camerer (Democratic Alliance) rebuffed this suggestion. Chohan-Khota pointed out that, problematically, "many people in South Africa regarded marital rape as a 'lesser' rape," and that "there was a clear need to reverse the perception that a person saying 'no' could mean 'yes,' and that consent did not exist in these cases."[390] The inputs of Camerer and Chohan-Khota made clear that the country should be moving forward and not backwards in protecting survivors of marital rape and sexual violence more broadly.[391]

The year 2007 brought other significant legislative reforms in the arena of sexual violence. SORMA, which had significant inputs from feminist experts, overhauled the

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[388] Tshwaranang et al. *Submission.*

[389] Briefing by the Department of Justice on the Criminal Law (Sentencing) Amendment Bill (B15-2007), Justice and Constitutional Development Portfolio Committee, 11 June 2007, https://pmg.org.za/committee-meeting/8177/.

[390] Ibid.

[391] Ibid.

outdated common law on rape, introducing broader definitions of sexual offenses and more comprehensive protective measures for victims.[392] SORMA now provides that whenever a person is charged with an offence under sections 3 (rape,) 4 (compelled rape,) 5 (sexual assault,) 6 (compelled sexual assault) and 7 (compelled self-sexual assault,): "it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant."[393] The subject of marital rape is thus reflected in the present legislative framework pertaining to sexual violence, reflecting the hard-won gains of feminist activists and academics.

4.7 Conclusion

The tone of *Modise*, *Mvamvu* and *Moipolai* is evocative of the ideologies that buoyed the marital rape exemption during the 1980s when Parliament refused to legislate it away. Betraying a lack of understanding about the nature of rape or attempted rape of wives, the courts enlisted cultural beliefs and the relationship between the accused and the complainant as central components of their sentencing determinations. The fact of the rapes is not denied, but the convictions are essentially rendered meaningless by the Courts' overt disavowal of the iniquity of rape. Because the justifications are drawn from cultural myths, the learned justices easily lean upon them as though they represent universal truths about sexual violence

The language in the sentencing determinations embodies a continuing uneasiness, reinforcing the longstanding idea that marital rape is still a lesser form of sexual assault; that it is not quite a crime or injustice and thus does not merit the same level of opprobrium or punishment as other rapes. They signal to women that their suffering is peripheral and justifiable. The cases illustrate how easily judges deviate from the minimum sentences, and affirm the importance of the Amendment to the Minimum Sentences Act and SORMA. In the South African context, the prevalence of such neutralising discourse is engendered

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[392] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA); Artz and Smythe, *Should We Consent?*

[393] SORMA, Section 56.

by certain factors. A societal acclimatisation to extreme levels of violence is compounded by normatively infused patriarchal notions of gender relations. Longstanding rape myths which are given life again and again as disavowal techniques are employed at all levels of society.

In contrast, there are indications that the Courts are transforming to dismantle the false benchmarks for rape set in by post-1997 jurisprudence. In its 2010 decision in *Matyityi*, the SCA criticized unreasonable assessments of harm pertaining to rape. It chastised a trial judge for concluding that the victim had suffered no injuries and made clear that to limit the assessment of harm to physical injury is to "fundamentally misconstrue the act of rape itself and its profound psychological, emotional and symbolic significance for the victim."[394] Time will tell whether and how the reasoning in marital rape cases will evolve in light of the legislative shifts and transformation of the judiciary. For now, what decisions such as *Mvamvu*, *Moipolai* and *Modise* lay bare is how easily damaging assumptions about sexual violence in intimate relationships enter the legal system, and permeate its highest echelons.

[394] *State v Matyityi*, 10.

5 Chapter 5: The Culture Conundrum: How Mainstream Conceptions of *Ukuthwala* Mask the Linkages Between Marriage and Rape

5.1 Introduction

Human behaviour and expression of identity and community are infinitely messy. This is what renders the notion of culture so precarious. When conceived of in narrow terms, culture forms a protective halo over languages, customs, laws and ideologies.[395] It fosters unity and sameness, as well as diversity and division. It dictates what behaviours are deemed acceptable while castigating non-compliance; and it creates hierarchies of being. Culture in this sense is incredibly powerful, yet concomitantly dangerous. In the words of geographer Mitchell, "culture," as an abstraction that is made real by its application, is a "structuring imposition."[396] The delineation of cultural parameters "creates partial yet globalizing truths," often to the detriment of those who hold less power in a society.[397]

The *Mvamvu* judgment, discussed in the previous chapter, displays the force of patronizing and regressive understandings of Black and rural culture in South Africa.[398] By depicting violence and unfettered patriarchy as inherent aspects of Black rural culture, the Court remained blind to the wife as a distinct and unique human being. Instead, on the assumption that the wife should be familiar with and used to violence, the Court's language diminished her suffering and trivialized her right to be free from violence. By doing so, it invalidates the severity of marital rape.

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[395] Generally the misunderstanding is, as critiqued by Sally Engle Merry, that culture is "a reified thing, as bounded and static": Sally Engle Merry, "Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)," *Polar: Political and Legal Anthropology Review* 26, no. 1 (2003): 58.

[396] Mitchell, "There's No Such Thing," 108.

[397] Ibid., 107-09.

[398] *S v Mvamvu* para 16.

The Court's rhetoric is a flagrant example of culturalism, the position that culture "'independently' exists," and that "cultural distinctions are necessarily real and rooted in the peoples being analysed."[399] In the fashion of earlier and now outdated anthropology, culturalism imagines culture as unchanging and with discrete boundaries.[400] This rigid and naive assessment is largely ascribed to peripheral populations – groups that are not white, or that live outside of the global West.[401] There is another key yet less apparent way in which institutions in South Africa employ culturalism to invisibilise marital rape, and that is concerning the matter of *ukuthwala*, the focus of the present chapter. Engaging with the larger theme of (in)visibility that underpins the dissertation, I ask the question: In the case of *ukuthwala*, how does institutional culturalism obscure the link between sexual violence and marriage?

Ukuthwala is the isiXhosa and isiZulu word for the practice of abducting or carrying off a girl or woman for purposes of marriage. Variations of this practice are also found across South Africa amongst tshiVenda, siSwati, xiTsonga, sePedi and isiNdebele speaking groups, and others, each having their own terms and characteristics.[402] Since 2009, in response to what is perceived as a re-emergence and violent distortion of the practice, civil society groups, state bodies and scholars have mobilised to condemn and curb *ukuthwala*.[403] Notwithstanding the multiple forms of the practice, "*ukuthwala*" has come to be used as the collective label for customary forms of bride abduction, and is now synonymous with forced child marriage or forced marriage.

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[399] Mitchell, "There's No Such Thing," 108.

[400] Razack, "Imperilled Muslim Women," 131; Sally Engle Merry, "Law, Culture, and Cultural Appropriation," *Yale Journal of Law & the Humanities* 10 (1998): 575-77.

[401] Volpp, "Blaming Culture," 94-98.

[402] It is practiced in other parts of Africa, and Central Asia. It has also been practiced in Europe.

[403] For example, strategic litigation (the *Jezile* case), a South African Law Reform Commission (SALRC) project researching *ukuthwala* and identifying methods for stemming the practice, a Draft Bill proposed by the SALRC to address *ukuthwala*, numerous academic articles, a taskforce set up in KwaZulu-Natal province, and community consultations by state and local government institutions.

In earlier research on isiXhosa-speaking groups in the Eastern Cape, I interrogated the claims that the forms of *ukuthwala* that are the subject of public discourse and policy efforts are inauthentic manifestations of custom. Drawing from historical and ethnographic sources from the 19th and 20th centuries, my research confirmed that the sexual violence associated with modern *ukuthwala* has a long historical lineage.[404] Although the customary parameters of *ukuthwala* were heterogeneous, and were always contested by communities, recurrently the prospective marriage relationship transformed otherwise criminal acts of rape and coercion into behaviour that had a respectable purpose. According to local customary conceptions, the institution of marriage created a different set of understandings around sexual violence that rationalised men's use of coercion.

The aim of this chapter is not to rehash these prior arguments. Other scholars – notably historians and anthropologists – have broadened the *ukuthwala* discourse by speaking to the multi-generational prevalence of the violence, as well as problematic representations of the practice in archives and secondary literature.[405] Building upon that extant body of literature, this chapter seeks to convey how the dominant culturalist *ukuthwala* narratives that are employed by legal scholars, courts, policymakers and non-profit groups, hinder a deeper understanding of sexual violence in marriage. The assumptions upon which their undertakings are based perpetuate the view that the sexual violence in *ukuthwala* is antithetical to custom and exceptional.

Drawing from multiple fields, including anthropology, history, and socio-legal

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[404] Nyasha Karimakwenda, "'Today It Would Be Called Rape': A Historical and Contextual Examination of Forced Marriage and Violence in the Eastern Cape," in *Marriage, Land and Custom: Essays on Law and Social Change in South Africa* ed. Aninka Claassens and Dee Smythe (Claremont: Juta, 2013), 339-56.

[405] Nkosi and Wassermann, "A History of the Practice."; Rice, "Ukuthwala in Rural South Africa."; Kathleen Rice, "Understanding Ukuthwala: Bride Abduction in the Rural Eastern Cape, South Africa," *African Studies* 77, no. 3 (2018); W.J. Smit, "Rights, Violence and the Marriage of Confusion: Re-Emerging Bride Abduction in South Africa," *Anthropology Southern Africa* 40, no. 1 (2016); Smit and Notermans, "Surviving Change."; Thornberry, "Colonialism and Consent."; "Ukuthwala, Forced Marriage."; Wood, "Contextualizing Group Rape."; Mwambene and Kruuse, "The Thin Edge of the Wedge."

studies, I rely upon three concepts to illustrate how the recent discourse on *ukuthwala* distracts from a more contextual reading of marital rape, consequently limiting the scope and reach of policy interventions. I commence by addressing what I term the "*ukuthwala* crusade," the very visible and urgent push by various sectors of society to curb violence against rural girls. I place my analysis of this crusade within the context of global culturalist responses to forced marriages. My critique concludes that the mainstream perception of *ukuthwala* rapes as "spectacular" and anomalous prevents the sexually violent acts from being seen as part of a continuum of marital rape.

In the second section, I narrate how a rigid script has evolved out of the *ukuthwala* crusade in spite of legal precedent and literature that speak to the fluidity of customary practices. In order to align with Constitutional and human rights principles, the institutions committed to addressing *ukuthwala* have adopted a stubborn articulation of what true *ukuthwala* is. Such a constricted framing denies the realities of many communities in which violent forms of the practice are claimed as customary. Lastly, to counter the romanticism of the *ukuthwala* script, in the final section of the chapter I scrutinise patriarchy's general impact upon wives' sexual autonomy, an element the *ukuthwala* script essentially ignores.

5.2 The *Ukuthwala* Crusade: How The 'Spectacular Hides the Mundane'

5.2.1 The Birth of the *Ukuthwala* Crusade

From 2009 onwards, television and print media propelled the issue of coercive *ukuthwala* cases into the public space. It reported disturbing accounts of young girls in the Eastern Cape and KwaZulu-Natal (many of them impoverished and vulnerable orphans) forced into customary marriages with older men through the acts of kidnapping, assault, and rape.[406] All of this, the sources recounted, was being done under the guise of an almost

[406] This includes sustained media coverage (some examples include: Lesley Odendal, "Forcing the Issue," *Mail and Guardian*, 4 April 2011, https://mg.co.za/article/2011-04-04-forcing-the-issue; Clive Ndou, "Ukuthwala Still Rife in KZN," *The Citizen*, 11 June 2015, https://citizen.co.za/news/south-africa/401096/ukuthwala-still-rife-in-kzn/; Mia Malan, "Abduction a Perversion of the Past," *Mail and*

extinct but now revived customary practice, though in a distorted form. While the sweeping shifts in South Africa's economic, health and social landscape have uniquely shaped recent *ukuthwala* abductions, this irregular route to marriage is not novel, neither is the coercion that accompanies some of its forms.[407] Yet, because *ukuthwala* was not widely researched nor discussed prior to 2009, there is the assumption that recent abductions abruptly emerged out of obscurity.

Non-profits, academics, and state institutions contemplated these abductions through a human rights and legalistic paradigm; their perspectives moulded by the progressive principles of South Africa's Constitution and the plethora of laws designed to protect the vulnerable. The resulting shock to the consciences of those removed from the communities in which *ukuthwala* has been practiced gave rise to the "*ukuthwala* crusade," the term I use to characterise the concerted and sustained efforts of state institutions, legal academics and civil society to condemn and combat the abductions. The outcome of the crusade includes policy initiatives, litigation and ongoing public engagement.

My central critique of the *ukuthwala* crusade is that the sensationalised treatment of *ukuthwala*, motivated by erroneous assumptions of culture, eclipses a broader picture of gender violence and marital rape. *Ukuthwala* is now equated with "forced marriage," and like campaigns against forced marriage in other parts of the world, the institutional response to *ukuthwala* is reductive and simplistic, bearing the hallmarks of culturalism.[408]

Guardian, 15 December 2011, https://bhekisisa.org/article/2011-12-15-abduction-a-perversion-of-the-past. Government agencies have also taken action in educating the public about *ukuthwala* and making attempts to address it. See for example: "Ukuthwala," Department of Justice and Constitutional Development, accessed 3 March 2017, http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html.

[407] Monica Wilson, "Xhosa Marriage in Historical Perspective," in *Essays on African Marriage in Southern Africa*, ed. E Krige and J Comaroff (Cape Town: Juta, 1981), 136-37; Wood, "Contextualizing Group Rape."; Thornberry, "Colonialism and Consent."

[408] Smit and Notermans, "Surviving Change," 29-30, 32; Rice, "Ukuthwala in Rural South Africa," 382.

Before launching into the critique, in this sub-section I provide a continuing overview of the nature of the *ukuthwala* crusade.

In response to the media coverage, in August of 2009 the Gender Directorate in the Department of Justice and Constitutional Development instructed the South African Law Reform Commission (SALRC) to investigate *ukuthwala*.[409] Additionally, the government, traditional leaders and civil society actors spearheaded a host of activities and initiatives designed to curtail the practice.[410] They included the following: an imbizo[411] in Lusikisiki, Eastern Cape in 2009 organised by the Minister in the Presidency; pledges and declarations made by traditional leaders in the Eastern Cape, including King Sigcau of the AmaMpondo[412]; an Ukuthwala Provincial Task Team established KwaZulu-Natal Province; calls made by the Minister of Police and Minister of Justice and Constitutional Development for stringent prosecutorial measures to be taken; and seminars, capacity-building and awareness-raising by provincial and national government bodies.[413]

On the basis of extensive research processes, community dialogues and surveys undertaken by the SALRC, it recommended the enactment of a Bill to combat *ukuthwala*, and presented a draft of the proposed legislation in its extensive report released in early 2016.[414] From the submissions received and consultations conducted from 2014 to 2015, the SALRC reported that although some views varied, there was a "wide consensus that the practice of *ukuthwala* in its current form is distorted."[415] Emphasising the presence of a "social problem," the SALRC supported law reform to address *ukuthwala*, as "a distinction

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[409] SALRC, *The Practice of Ukuthwala*, 1.

[410] Ibid., 21-22.

[411] A community meeting.

[412] The AmaPondo are an isiXhosa speaking group mainly originating from the former Transkei, in present-day Eastern Cape.

[413] SALRC, *The Practice of Ukuthwala*, 21-22.

[414] Ibid.

[415] Ibid., 25.

should be drawn between this known custom and the current practices, which are illegal distortions of the custom."[416]

While citing the importance of non-legal measures at the community level to stem the abductions, ultimately the SALRC reasoned that the "symbolic and educational merits" of "a new consolidated statute" would be the most effective means of "attacking those distortions that have crept into olden usages and which amount to oppression."[417] The draft Prohibition of Forced Marriages and Forced Child Marriages Bill can also be understood as reflecting international and regional human rights norms and guidelines, which obligate states to create comprehensive legislative frameworks as a component of addressing harmful cultural practices.

There is certainly merit in the steps taken and proposed by stakeholders in regards to *ukuthwala*. The straightforward human rights legal application sends a clear and resolute message that the abuse of girls and women will not be tolerated irrespective of any cultural impetuses. The creation of a statute would also compel authorities to prosecute *ukuthwala* cases, as one of the concerns put forward by communities is that authorities decline to prosecute cases on the basis that *ukuthwala* constitutes a customary practice.[418] The extensive advocacy by state and civil society groups has also helped to sensitise communities about the detrimental impacts of coercive *ukuthwala*.[419] The unprecedented attention by institutions is undoubtedly commendable, but the crusade is also inherently flawed as it is framed in one-dimensional terms. I delve into these shortcomings in the subsequent sections.

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[416] Ibid., 53.

[417] Ibid., 54-55.

[418] Ibid., 2; Roberta Hlalisa Mgidlana, "Should South Africa Criminalise Ukuthwala Leading to Forced and Child Marriages?" (presentation, Centre for Social Science Research Seminar, University of Cape Town, 23 May 2017).

[419] SALRC, *The Practice of Ukuthwala*, 22.

5.2.2 The Shortcomings of the *Ukuthwala* Crusade

5.2.2.1 The Narrow Focus on Forced Marriage and Child Marriage

In popular discourse and legal literature, *ukuthwala* has now been branded as a harmful cultural practice – a form of forced marriage or trafficking.[420] As with female genital mutilation, honour killings, and other conspicuous forms of gender violence that are perceived as abhorrent, *ukuthwala* has been reconfigured as a "spectacular" display of gender violence, the kind of violence around which multilateral bodies, governments and (trans)national organisations rally. These human rights-oriented movements, acting from a Western liberalist ideal, are often drawn to occurrences of harm that are perceived as unfamiliar, bizarre, and uncivilised.[421] It is in this sense that the "spectacular hides the mundane," in that concerted movements to stem harmful practices can fail to link the harmful practices they decry to the less overt or everyday forms of brutality that women endure.[422]

By favouring the "spectacular," the advocacy campaigns are employed to distinguish the Western from non-Western, the enlightened from the traditional, the civilised from the uncivilised.[423] The modern movements against child marriage therefore dredge up repertoires from the past. Preoccupations with forced marriage have a long history, as European colonisers too obsessed over how to stem these "native" practices, and to protect women from the clutches of unfamiliar patriarchal practices, even though patriarchy prevailed in their own societies.[424]

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[420] For example, Mwambene and Sloth-Nielsen, "Benign Accommodation?."; Monyane, "Is Ukuthwala Another Form."; van der Watt and Ovens, "Contextualizing the Practice."

[421] Homi Bhabha, "Liberalism's Sacred Cow," in *Is Multiculturalism Bad for Women*, ed. Susan Moller Okin (Princeton: Princeton University Press, 1999), 81-84; Volpp, "Blaming Culture," 112-13.

[422]Bunting, Lawrance, and Roberts, *Marriage by Force?*, 2; Doris Buss, "Foreward," in *Marriage by Force?: Contestation over Consent and Coercion in Africa*, ed. Benjamin Lawrance Annie Bunting, Richard Roberts (Athens: Ohio University Press, 2016), ix.

[423] Volpp, "Blaming Culture."; Razack, "Imperilled Muslim Women."

[424] Bunting, Lawrance, and Roberts, *Marriage by Force?*, 3; Volpp, "Blaming Culture," 108.

One's definition of "spectacular" is naturally dependent on one's social and geographical positioning. Bhabha has argued that it is the reliance upon Western superiority that renders certain forms of violence spectacular.[425] For those immersed in environments where violations such as female genital mutilation, rape and abduction in war, and coercive forms of *ukuthwala* are rife, the violence is not in fact spectacular. Violence against women is mundane, meaning that though acts vary in extremity, consequence and visibility, the violence is ubiquitous.

The *ukuthwala* crusade bears the disquieting hallmarks of the international and national movements to curb forced and child marriages. As with movements in other parts of the world, the domestic push against *ukuthwala* is framed as a human rights issue, revealing an element of panic and urgency in rescuing young girls from a life of servitude and violence.[426] Analogous to the comparative context, the *ukuthwala* crusade narrative elides nuances of the practice, and assumes that persons, other than white persons, are governed by set cultural prescripts.[427]

Another critique levelled against mainstream advocacy in relation to forced marriage is that it does not comprehend the spectacular acts of violence against women as being part of a continuum of violence.[428] Scholars who argue for a more contextualised approach to forced marriage in Africa make the point that seeing "spectacular acts of violence – such as rape in war or the targeting of schoolgirls in Nigeria, Uganda, or Pakistan" as part of a continuum of gender discrimination would allow for them to be linked to "daily acts of violence – such as street harassment, employment inequality, or intimate partner violence."[429] As the case of *ukuthwala* exemplifies, the customary practice holds a privileged place within policy and human rights agenda in South Africa. The

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[425] Bhabha, "Liberalism's Sacred Cow," 81-82.

[426] Bunting, Lawrance, and Roberts, *Marriage by Force?*, 2-3.

[427] Ibid.; Volpp, "Blaming Culture," 96.

[428] Bunting, Lawrance, and Roberts, *Marriage by Force?*, 2; Buss, "Foreward," ix.

[429] Buss, "Foreward," ix.

crusade focuses on girls but this is to the exclusion of other forms of sexual violence in marriage that also occur frequently, but comparably receive little consideration.

The *ukuthwala* crusade is an archetype of how "the continuum of violence is surprisingly difficult to see" from a superficial standpoint.[430] The re-framing of *ukuthwala* as forced child marriage parallels trends in the international and regional human rights discourse. Within these arenas, forced marriage is receiving an "unprecedented level" of interest, giving rise to "intense political, juridical" and "public interest" within nations.[431] In sub-Saharan Africa, "forced marriage has emerged as one of the more critical human rights challenges in the twenty-first century," to the point that international norms are influencing legislation and discouraging the practice of certain customs.[432]

Institutions sensationalise violence in marginalised groups, rather than conceiving of it as a manifestation of a broader societal ethos of gender violence. As Volpp comments, "(w)hen we gaze with condemnation" at other groups, "we can miss the fact that 'our' culture is also characterized by problematic, sex-subordinating behaviour."[433] Violent *ukuthwala* is named as being apart from us, a discrete form of gender violence that disproportionately affects girls and is committed by wayward men. But there is a need to apply a more expansive and sensitive approach to *ukuthwala* so that it becomes legible as part of the continuum of marital violence, and to bring to light the sexual violence that women suffer throughout their marriages, not just in the beginning stages of marriage.

Writing in support of the need to complicate the discourse on forced marriage in Africa, Bunting, Lawrance and Roberts critique the reductive portrayal of forced marriage. They observe that "(i)n the case of 'child, early, and forced marriage', the focus of policy and academic discussion is often reduced to 'child marriage.'" [434] Moreover, they

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[430] Ibid.

[431] Bunting, Lawrance, and Roberts, *Marriage by Force?*, 3, 28-29.

[432] Ibid., 28-29.

[433] Volpp, "Blaming Culture," 115.

[434] Bunting, Lawrance, and Roberts, *Marriage by Force?*, 2.

note, "even 'child marriage' is further reduced to 'girl brides'. Thus, though a lack of capacity to consent to marriage due to age is a dimension of forced marriage, the concentration on girls obscures analysis of the limitations on consent more generally."[435] How consent is conceptualised at the level of the local is distinct from the notion of consent as defined under legal frameworks. The latter often use age as a marker, but the accentuation of "girls" detracts from the manner in which both overt and subtle forms of coercion operate within familial and other hierarchies.[436]

Masimanyane, an East London-based women's rights organisation which does work throughout the Eastern Cape, has recently shifted its orientation in regards to violence and marriage. While previously the forced marriage project focused on girls, under its new model, the organisation now addresses the factor of coercion in marriage more broadly – for example examining how women in churches are compelled to marry members of the church who have been chosen for them.[437] Masimanyane also assists older women who were *thwelwe* (the state of having been subjected to the *ukuthwala* process) in their youth and are still carrying trauma from the abuse.[438] Through a more multifaceted approach Masimanyane is able to call attention to both overt and covert forms of marriage-related violence and to attend to the needs of a broader range of age groups.

5.2.2.2 A Simplistic and Silencing Approach

In addition to prioritising the issue of forced marriage and child marriage, the discourse of the *ukuthwala* crusade is, on the whole, unvarying. This is in part because the crusade operates from an intractable script that only presents part of women's truths (I shall discuss this script in the next section). The status quo discourse is premised upon the view that Black rural culture is stagnant, possessing embedded and consensual features.

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[435] Ibid.

[436] For discussions on the unique meanings of consent at the level of the local in isiXhosa- speaking communities, see Thornberry, "Ukuthwala, Forced Marriage," 143-45; Karimakwenda, "'Today It Would Be Called Rape.'"

[437] Interviewees 15, 16.

[438] Ibid.

Further, it concentrates on just a fragment, a moment, of ongoing and pervasive sexual coercion.

In stressing what it deems a uniquely abhorrent form of gender violence, the crusade ignores the broader social import of the concept of marriage – an institution in which such forms of brutality are allowed to prevail, but mostly remain invisible. Blinded by the spectacular, the crusade neglects to consider that the *ukuthwala* performance signals a continuation of violence that filters into the marriage. It presents a flattened representation of what women and girls live. There is the desire on the part of those who have power to speak for communities (policymakers, traditional leaders, etc) to declare that sexual violence is not part of custom, in the face of contrary evidence provided by survivors themselves.[439]

Masimanyane staff reported that when *ukuthwala* survivors testified before a government body, they communicated that violent *ukuthwala* was the norm in their communities; that it was in fact custom. Some of the government commissioners seated on the panel flatly rejected the women's claims that the violent forms of *ukuthwala* that they had been subjected to were customary. One commissioner bluntly retorted: "Call it something else. And what you are talking about here, it's not *our ukuthwala*."[440]

By silencing the very communities that it seeks to help, the *ukuthwala* crusade perpetuates a form of epistemic violence.[441] It shuts out the voices of rural women who are experts on gender violence based on what they have lived and perceived. It suppresses the experiences of older women who were *thwelwe* and raped, and whose families and

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[439] Interviewees 13, 14.

[440] Interviewees 15, 16.

[441] 'Epistemic violence' is a term most closely associated with Gayatri Spivak's foundational essay. Gayatri Spivak, "Can the Subaltern Speak?," in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (Urbana: University of Illinois, 1988).

communities condoned this because it was custom. Writing on Spivak's famous essay *Can the Subaltern Speak*, Kapoor reflects:

> …for Spivak, it is dangerous to assume that one can encounter the Third World, and especially the Third World subaltern, on a level playing field. Our interaction with, and representations of, the subaltern are inevitably loaded. They are determined by our favourable historical and geographic position, our material and cultural advantages resulting from imperialism and capitalism, and our identity as privileged Westerner or native informant. When the investigating subject, naively or knowingly, disavows its complicity or pretends it has no 'geo-political determinations', it does the opposite of concealing itself: it privileges itself.[442]

The institutional actors championing the crusade appear not to be aware of the damage they are effecting, nor their privilege. Rural women are confronted by government representatives, influential civil society groupings and scholars whose power radiates out from the metropole. In the same fashion as colonial agents, the outsiders and insider elites declare what culture is, and discard any narrative that diverges from their estimations. They feed the rural natives what they think they need to free themselves from the savagery of "distorted" *ukuthwala*, and as such do not allow the subaltern to "speak."[443]

The SALRC's *ukuthwala* report too perpetuates epistemic violence against rural communities. The report takes for granted that coercive forms of *ukuthwala* are aberrant, and consequently its conclusions and recommendations stem from that premise. To its credit, the SALRC report does provide some contextual analysis. Tying in history, the report remarks that as an irregular route to marriage, *ukuthwala* served to "counter the influence of extreme authority" in certain scenarios and was not "a rigid and formalistic prescript" as portrayed by popular discourse.[444] Speaking to the spectrum of violence, the

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[442] Ilan Kapoor, "Hyper-Self-Reflexive Development? Spivak on Representing the Third World 'Other'," *Third World Quarterly* 25, no. 4 (2004): 631.

[443] Spivak concludes in her essay that the subaltern cannot speak: "Between patriarchy and imperialism, subject-constitution and object-formation, the figure of the woman disappears... There is no space from which the sexed subaltern can speak." Spivak, "Can the Subaltern Speak," 306.

[444] SALRC, *The Practice of Ukuthwala*, 5.

report stresses "it is crucial to view *ukuthwala* as a symptom of the larger issue of gender-based violence and the disempowerment of women and girls."[445] It also clarifies that "the practice itself is not the issue, but rather the problem is circumstances that create and perpetuate abuse."[446] On this point, the report notes the broader patriarchal forces at play, highlighted by women's rights NGOs during the consultative process.[447]

In spite of the aforesaid points, ultimately the SALRC surmises that the present forms of *ukuthwala* are inauthentic. It comments: "Notwithstanding the logic of *ukuthwala* in its proper context, it is clear that there is abuse of this practice."[448] Positioned comfortably in the presumption that violent forms of *ukuthwala* have no customary endorsement, the stakeholders ignore the established communal patterns that sustain the supposed aberrations of the practice. Although HIV/AIDS myths and patriarchal stereotypes are cited as factors, the institutions assume that the factors of poverty and parental complicity are primarily responsible for the "resurgence" of the custom.[449]

Aside from Masimanyane, the discourse of institutions invested in addressing *ukuthwala* does not speak to the multi-generational nature of the violence. Many women, including older women likely present in the community meetings which informed the SALRC findings, have survived of brutal forms of *ukuthwala* themselves. Decades ago, these women could not seek help; they could not return home because their families were complicit in the abductions and the rape which were the normative features of *ukuthwala*.[450]

Explicating the need for scholarly interventions that "move beyond the representation of forced marriage as 'scandal' and increase the visibility of forced marriage

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[445] Ibid., 16.

[446] Ibid.

[447] Ibid., 14.

[448] Ibid., 9.

[449] Ibid., 20.

[450] Interviewees 13-16.

in Africa's historical past and its persistence… into the contemporary present," Bunting, Lawrance and Roberts declare that:

> …representations of forced marriages are often monocausal, simplistic, heteronormative, and reflective of vested interests. What may be gained in terms of public visibility may actually be to the detriment of a richer and more nuanced understanding of the sociocultural habitus of forced marriage in Africa. Very few of the developments…are demonstrably tied to empirical fieldwork or synthetic scholarly analysis of forced marriage practices or patterns.[451]

There is a growing body of *ukuthwala* literature based on extensive ethnographic and archival research, but what remains to be seen is whether it will be incorporated into future policy agendas. For now, public and academic discourse primarily adheres to the standardised script. The state and civil institutions representing the crusade rely upon the idyllic and precise depiction of *ukuthwala* in customary law literature, and as such are able to deduce that *ukuthwala* "is now carried out by vagrant and loitering men who just want to satisfy their lust."[452] This kind of representation condenses an elaborate and longstanding phenomenon into a sensationalised trend.

5.3 The *Ukuthwala* Script and The Mystifying Search for an Unchanging Custom

5.3.1 The Fluid Nature of Custom

My second critique of institutional responses to *ukuthwala* integrates the highly contested notions of "custom" and "customary law," which fall under the ambit of culture. I take the position that "culture" and the components of "custom" are not discrete entities that are invariably patriarchal, unyielding, and confined to rural, Black populations. As the *ukuthwala* script is culturalist in orientation, it draws from a less dynamic formulation of custom and customary law. Before I engage with a discussion of the script itself and its pitfalls, it is vital to first explore debates on the construction of "customary law" and "custom" as these bear import for the subject of *ukuthwala*. The work of certain legal

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[451] Bunting, Lawrance, and Roberts, *Marriage by Force?*, 29.

[452] SALRC, *The Practice of Ukuthwala*, 20.

historians and socio-legal scholars deconstructs the customary law designation, and encourages a more flexible understanding of custom.

The term "customary law" is enshrined in the Constitution. The Constitution also affirms the importance of culture generally. Section 211 subsection 3 states: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." Other provisions of the Constitution articulate the right to cultural life and the right to promotion of culture (sections 30 and 31 respectively).

The idea of customary law is not straightforward in itself with some scholars questioning whether such a thing exists, or whether the term is helpful. To begin with, there is an evident tension in terms of what customary law actually refers to. Progressive scholars such as Chanock take the position that "customary law" is a recent invention, borne out of the sweeping changes resulting from the colonial encounter, and manipulated into the restrictive framework of positive law.[453] Free from co-optation by the state, true custom sits outside of customary law.[454] Due to the pernicious impact of colonialism and apartheid on constructions of Blackness and Black customs, some scholars, such as Mnisi-Weeks reject the terms "customary law" altogether, preferring the designation "vernacular law."[455] In contrast traditionalists contend that there is a pre-colonial pure form of customary law that can be retrieved and applied.[456]

It has been accepted that what is referred to as customary law now encompasses both official customary law and living customary law. Official customary law refers to that which is set out in legislation, court precedent and academic treatises (as relied upon by

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[453] Chanock, *Law, Custom, and Social Order*, 240.

[454] Chanock, "Law, State and Culture," 55.

[455] Mnisi Weeks, *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa*, 62.

[456] For a discussion of the ideological differences between progressivists and traditionalists see Mnisi Weeks, "The Interface Between," 14-16.

the courts), and "imposed and constructed" by the colonial authorities.[457] The latter description encapsulates Chanock's view of "customary law" as an artificial construct, with community norms having been manipulated into "enforceable rules of positive law."[458] In comparison, Mnisi Weeks defines living customary law as "that manifestation of customary law that is developed and observed by rural communities, attested to by parol."[459]

Post-apartheid judicial precedent establishes that the "customary law" referred to in the Constitution encompasses living customary law, and not just "official" customary law. The seminal Constitutional Court judgments in *Alexkor v Richtersveld Community* [460] and *Shilubana v Shilubana and others v Nwamitwa* [461] underscore the significance and fluid nature of living customary law. In *Alexkor*, a land restitution case, the Court noted that although "in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law," and that "(i)ts validity must now be determined by reference not to common law, but to the Constitution." [462] It further averred that "(i)t is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life."[463] In the *Shilubana* judgment, which concerned a chieftaincy dispute, the Court declared that "customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated."[464]

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[457] Ibid., 9.

[458] Chanock, "Law, State and Culture," 55.

[459] Ibid.

[460] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

[461] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

[462] *Alexkor* paras 51-52.

[463] Ibid., para 52.

[464] *Shilubana and Others v Nwamitwa*.

Even though living customary law has been endorsed by the Constitutional Court, the Court and other institutions concerned with customary law have a penchant for extracting it from its highly localised, multi-textural and ever shifting nature.[465] There is an inclination towards "skeletal systematizing" that straightjackets local systems of order, distilling varied models of customary practice into discrete and fixed rules.[466] The linear rules documented in academic and legal texts or in prior court decisions must still be regarded with some suspicion. Admittedly, texts may be useful but, as Bennett cautions, "few, if any…can claim to be direct, personal accounts of community practice. They are the work of many informants, each of whom brings to bear on the subject his or her own preconceptions and prejudices."[467]

The salient point to take away from the more reflexive discourse on customary law is that, given the consistent re-negotiation of norms on the ground, it is futile to create metaphorical stencils depicting customary law. This may generate the question of how to delineate between law and practice. From her ethnographic work in KwaZulu-Natal, Mnisi Weeks articulates her doubts about attempting to answer the thorny question of how customary practices can be differentiated from customary law. Her musings are as follows:

> If one thing is apparent from the study I have conducted, it is the fact that the pull toward extrapolating positive, mechanically-enforceable legal rules from living law is very strong (because of the force of the positivist epistemic legal culture) regardless of the fact that all evidence points to its being a trap. Community law is essentially a negotiated order and it is therefore less than easily predictable or its rules mechanically reproducible.[468]

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[465] This is one of the central concerns in Mnisi-Weeks' research. Of the Constitutional Court she writes: "Yet, contradictorily, they subordinate customary law to a conception of law that emphasises a legal certainty that is to be found in formalism as well as the formally conceived human rights (found in the Bill of Rights) that dominate their liberal discourse." Mnisi Weeks, "The Interface Between," 6.

[466] Chanock, "Law, State and Culture," 63.

[467] Tom Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Cape Town: Juta, 1991), 1.

[468] Mnisi Weeks, "The Interface Between," 372.

What I find most enriching about Mnisi Weeks' work is that it induces scholars of local systems of ordering to constantly deconstruct and question the paradigms through which they conduct their work. Communities are not without law, in the sense that they are devoid of systems of order, but the terms of this "law" cannot be dictated by the positivism infused by the colonial order; instead it is more useful to perceive local law as "disparate forms of ensuring order."[469] But, the range of norms that exist alongside each other are not all readily apparent to the outsider. It means that what is seen cannot be taken for granted; one must interrogate that which is seemingly too neat, rigid and uniform. Hence, I now critique what I refer to as the "*ukuthwala* script," for its shortcomings are better discerned in juxtaposition with the present discussion on customary law.

5.3.2 The Nature of the *Ukuthwala* Script

In addition to the "horror-stricken" and sensationalist media coverage, a very limited body of literature on customary law has framed much of the *ukuthwala* crusade's agenda.[470] The dominant research on customary law falls prey to the "skeletal systematizing" and positivism that Chanock and Mnisi Weeks warn against. Some of the commentary predates 2009, but a discernible body of research has been published in response to the heightened media and policy attention. Foregrounded by Koyana and Bekker's earlier description of *ukuthwala* as a "charming" and "romantic practice," legal experts have worked from the assumption that violent forms of *ukuthwala* are distortions of the true, historical custom.[471] Although *ukuthwala* as a lived customary practice violates many of the rules of predictability – and is certainly more multi-faceted than any texts could capture – legal scholars treat it as a predetermined act reflecting an "idyllic situation."[472]

The script dictates that in the idyllic past, *ukuthwala* was a practice akin to elopement where a couple wanted to force their families' hand in accepting their marriage; or

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[469] Ibid., 12.

[470] Rice, "Ukuthwala in Rural South Africa," 382, 99.

[471] Koyana and Bekker, "The Indomitable Ukuthwala Custom."

[472] Smit citing interview with Bekker. Smit, "Rights, Violence," 63.

alternatively could be used to make a marriage occur quickly, where for example, the girl or woman was pregnant.[473] *Ukuthwala* was also a tool that a couple or intending groom could employ where they could not afford to engage in the lengthy and costly negotiations leading up to "regular" marriage.[474] While a few sources do report that some forms of *ukuthwala* employed force, they largely have painted *ukuthwala* as an innately benevolent practice involving "mock abduction" during which the intended bride would be expected to feign displeasure and resistance as a sign of modesty. [475]

The literature underscores too that sexual intercourse was never countenanced as part of the abduction, and in the event that the male did violate the female he was required to pay a fine.[476] Even where observers recorded patent violence during abductions that took place decades ago, it is dismissed as being part of the mock abduction, and the matter of sexual violence is generally not commented upon, except as an illustration of customary anathema.[477]

In short then, the *ukuthwala* narrative prescribes that under customary law, there were safeguards put in place to protect women, and therefore the contemporary occurrences of violence are patent abuses and distortions of the customary practice.[478] A central criticism here is that the script relies upon a sanitised notion of the past. It is true that elopement, feigned protest on the part of the chosen bride, and protective measures

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[473] J.H. Soga, *The Ama-Xhosa: Life and Customs* (Lovedale: Lovedale Press, 1931); Wilson, "Xhosa Marriage," 136-37; Koyana and Bekker, "The Indomitable Ukuthwala Custom."

[474] J. van Tromp, *Xhosa Law of Persons: A Treatise on the Legal Principles of Family Relations among the Xhosa* (Cape Town: Juta, 1948), 71.

[475]Wilson, "Xhosa Marriage."; Nkosi and Wassermann, "A History of the Practice."; Tom Bennett, "The Cultural Defence and the Custom of Thwala in South African Law," *University of Botswana Law Journal* 10 (2010): 7; Koyana and Bekker, "The Indomitable Ukuthwala Custom," 141, 43; van Tromp, *Xhosa Law of Persons.*

[476] Bennett, "The Cultural Defence," 7.

[477] See Smit's commentary on this trend. Smit, "Rights, Violence," 60-61. On the limitation of the archives see Nkosi and Wassermann, "A History of the Practice."

[478] Bennett, "The Cultural Defence," 25.

for women and girls did characterise some forms of *ukuthwala*, but there were other customary forms. The customary legal texts, and even some older ethnographic sources, reflect an idealised customary milieu. The following excerpt from a recently published article reflects the sense of romanticism that permeates legal discussions:

> It is important to understand the foundation of *Ukuthwala* and to identify the spirit of uBuntu behind the practise. *Ukuthwala* in its traditional form played an important role in the traditional courting process…At face value and especially when studying the harmful practise of the distorted *ukuthwala*, it is in contradiction to the social character of a traditional African society. However, the traditional form shows the caring and sense of social cohesion and solidarity which forms the basis of uBuntu.[479]

Legal commentary such as this propagates the idea that sexual violence is extremely rare, if not impossible, within a genuine African setting. Sweeping classifications such as "traditional African society" are perplexing. They "other" Black communities and leave little room for agency, conflict and complexity. The Department of Justice and Constitutional Development's *ukuthwala* brochure follows in a similar fashion: It cites that in "ancient Africa" *ukuthwala* was a "condoned albeit abnormal path to marriage targeted at certain girls or women of marriageable age. But it did not involve raping or having consensual sex with the girl until marriage requirements had been concluded."[480]

As the above sources plainly show, motivating the *ukuthwala* script is a desire to return to an illusory past. In the words of Ratele, "(t)he attempt to restore pre-apartheid African traditions… is marked by the fantasy of a precolonial, non-conflictual and homogenous Africa."[481] All societies have norms and values that are created to foster communal cohesion. The notion of human rights is not the exclusive province of Western enlightenment. But sexual violence, including marital rape, has existed since time immemorial, irrespective of opposing norms, philosophies, treaties, conventions,

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[479] van der Watt and Ovens, "Contextualizing the Practice," 14.

[480] Department of Justice and Constitutional Development, "Ukuthwala."

[481] Kopano Ratele, "Masculinities without Tradition," *Politikon: South African Journal of Political Studies* 40, no. 1 (2013): 136.

legislation, or any other mechanisms human beings have developed. Sexual violence is also a norm – it is part of what people do and what men often agree upon – and a history of rape laws around the world reflects this.[482]

The *ukuthwala* script operates not only from the reverie of a perfect past, but also from a rigid legalistic perspective – again reflecting the positivist pull. Scholars apply South Africa's constitutional and legislative parameters, set against the broader framework of international human rights, to evidence that violent forms of *ukuthwala* violate a host of laws and rights.[483] By the nature of their disciplinary grounding, mainstream legal scholars and practitioners tend to look for certainty and clear rules as opposed to nuance. They are guided by legislation, established principles and precedent. Problematically, by being securely ensconced within the clinical confines of the law, legal discourse can at times be disconnected from the messy and ever-shifting realities on the ground. By attempting to fit the acts of rape and kidnapping that routinely occur with *ukuthwala* into modern human rights and criminal law paradigms, law experts have in a sense failed to take account of the fact that many women and girls are subjected to rape within marriage because such practices are locally sanctioned.[484] They are not simply the acts of a few rogue "horny bastards" who are abusing culture.[485]

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[482] Brownmiller, *Against Our Will.*

[483] For example: Looking at Constitutional and legislative provisions, Monyane concludes that *ukuthwala* is a form of forced marriage. Monyane, "Is Ukuthwala Another Form," 79. Maluleke explores how *ukuthwala* prohibits girls' development and also outlines the various legal provisions under which victims can secure protection. Joyce Maluleke, "Culture, Tradition, Custom, Law and Gender Equality," *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 15, no. 1 (2012): 8-9, 11-12.); van der Watt and Ovens look at *ukuthwala* in the context of child trafficking cases. van der Watt and Ovens, "Contextualizing the Practice."

[484] Mwambene and Sloth-Nielsen, "Benign Accommodation?."; Monyane, "Is Ukuthwala Another Form."; van der Watt and Ovens, "Contextualizing the Practice."; Maluleke, "Culture, Tradition, Custom."; Mubangizi, "A South African Perspective."

[485] Rice, "Ukuthwala in Rural South Africa," 382.

Though there is evidence in the historical and ethnographic resources to refute the validity of the popular rhetoric, the *ukuthwala* narrative holds fast in policy initiatives and in jurisprudence. By disregarding the salience and reach of customarily sanctioned sexual violence, the rigid and myopic script explains away the rapes, branding them as abnormal occurrences. Smit has observed this sanitising tendency which contradicts the diverse realities in Eastern Cape communities:

> …there appears to be a stubborn persistence in scholarly debate of dismissing these realities in defence of a "real," "authentic" and historically "correct" custom that never involved violence and remained static. This misconception can be ascribed to the fact that the majority of voices in the debate have largely spoken from a legal context which clearly differentiates between constitutionally acceptable codified forms of customs governed by laws, and the living custom practiced at the local level.[486]

The more grounded research of anthropologists such as Smit is critical for elucidating the limitations of the culturalist *ukuthwala* script. As I noted earlier, a mushrooming of research outside of the strict demarcations of the law evinces that *ukuthwala*, as an irregular form of marriage, has had multiple representations throughout history, all existing alongside each other, and changing in prevalence and character over time through the colonial and apartheid encounters.[487] There was never one ideal form of *ukuthwala* that spanned all communities. In some isiXhosa speaking communities, in which the majority of the empirical research has been done over the past decade, sexually violent forms of *ukuthwala* were widely practiced and accepted as part of custom. Notwithstanding this fluidity, in portraying custom as both static and egalitarian, the *ukuthwala* script obscures the sanctioning of sexual violence within marriage and marriage-related contexts.

5.3.3 The Jezile Case: The Application of the *Ukuthwala* Script

In *Jezile v S and Others*, the highest court decision relating to *ukuthwala*, the Western Cape High Court pronounced the type of abduction practiced by Mvumeleni Jezile as

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[486] Smit and Notermans, "Surviving Change," 43.

[487] Nkosi and Wassermann, "A History of the Practice."; Smit, "Rights, Violence."; Thornberry, "Ukuthwala, Forced Marriage."; Smit and Notermans, "Surviving Change."

"aberrant,"[488] and affirmed the convictions and sentences handed down by the lower court. Jezile had been sentenced to 22 years for rape, assault and trafficking for abducting then 14-year old Nolutho Yekiso in the Eastern Cape and forcing her travel to his home in Cape Town, during which time he raped and assaulted her. This pivotal judgment fittingly takes a strong position in favor of protecting the well-being of girls. My critique is that, falling into the trap of straightjacketing and romanticising customary practices, the Court missed the opportunity to confront how strongly the cultural beliefs that Jezile put forward for purposes of his defence at the appeal level resonate within communities such as the one he came from in the Eastern Cape.

On appeal before the Western Cape High Court, Jezile advanced the argument that the trial court had "misdirected itself in not proceeding from the premise that the merits should have been determined within the context of the practice of *ukuthwala*, or customary marriage."[489] The appellant sought to have the court assess his actions through the lens of Xhosa custom in order to rationalise his sexual violation of Yekiso, and render the issue of her consent immaterial.[490] Given the constitutional implications invoked by the appellant's customary law argument, the Court issued letters of interest to organisations to provide submissions on the "complex and contested issue" of *ukuthwala* under customary law.[491]

I will not delve into the details of the (at times conflicting) customary law arguments presented by the appellant Jezile, nor relate in detail the varied perspectives of the seven

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[488] *Jezile v S*, paras. 85, 90, 95, 103.

[489] Ibid., para. 52.

[490] Ibid. As an observation, and as the court noted, Jezile's testimony regarding coercion ended up contradicting the position that his lawyers and the expert they called had advanced about the accepted parameters of *ukuthwala*. See paragraphs 42-44, 52, 85-86, 91-94. This added to the confusion of the case and the judgment.

[491] Ibid., paras 54, 56.

amici curiae and various experts whose evidence the Court relied upon.[492] What I seek to draw as salient from the case are the divergent viewpoints on the accepted customary parameters on *ukuthwala*. Per the test articulated in *Shilubana and Others v Nwamitwa*, the court set out to determine the content of the practice as only the "traditional form of *ukuthwala* could be recognized under our law."[493] The Court's determination to pin down the one traditional form of *ukuthwala* elucidates the tendencies of courts to seek certainty by casting a wide net over distinct groupings of Black people.

The norms that are presented before any court, or in texts, are "but a small sampling of legal norms. A plethora of norms exists that are implicit and hence unarticulated – existing as conditions, qualifications and exceptions to articulated rules – and do not surface except when members seek to appeal to them."[494] Jezile sought to appeal to his own lived version of custom. At the appeal level he maintained that the form of *ukuthwala* that he had practiced constituted living customary law, and did not require consent, nor adhere to the age restrictions set out in the Recognition of Customary Marriages Act (RCMA).[495] Before the trial court, appellant's expert witness Professor Francois De Villiers testified that the process followed by Jezile did accord with tradition (albeit in violation of the RCMA) and that "historically women and girls could indeed be forced into these 'marriages.'"[496] He further spoke to the conflicts between constitutional principles and customary practices, conceding that legislation sought to enforce compliance of traditional

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[492] The seven *amicus curiae* were: The National House of Traditional Leaders, The Women's Legal Centre Trust, The Centre for Child Law, The Commission for Gender Equality, The Rural Women's Movement, The Masimanyane Women's Support Centre, and the Commission for the Promotion of Rights of Cultural, Religious and Linguistic Communities. The Court also relied heavily on the expert testimony of customary law scholar Professor Thandabantu Nhlapo.

[493] *Jezile v S*, para 81.

[494] Mnisi Weeks, "The Interface Between," 373-73.

[495] *Jezile v S*, paras 93-94. Section 3(1) of the RCMA provides that for a customary marriage to be valid, both spouses must be above 18 and must consent to be married under customary law. Section 3(3) allows for minors to be married where both parents or legal guardian have consented.

[496] Ibid., para 44.

practices with the Constitution.[497] The import of Jezile's expert's testimony is that even though the violent forms of *ukuthwala* did not comport with legislative and constitutional standards, they were customary nonetheless and could gradually be brought in line with those standards.

In contrast, all of the *amici curiae* and other experts before the court followed the *ukuthwala* script, with some difference. Some *amici curiae* spoke to how the coercive form of *ukuthwala* does depend on "a degree of participation and acceptance" in "many communities."[498] On the subject of patriarchy, the 4th to 7th *amici curiae*[499] articulated that both the traditional (the "relatively benign form") and aberrant form of *ukuthwala* "feed on the patriarchal nature of customary law."[500] Thus some evidence before the court did highlight the diverse and gendered manifestations of the practice. Ultimately though, the Court accepted the position of the *amici curiae* and experts that the version of *ukuthwala* that Jezile followed was "aberrant," and could not be protected under the law.[501] Outlining Professor Thandabantu Nhlapo's evidence, the Court stated that the essential features of traditional *ukuthwala* included, amongst other characteristics: consent by both parties and consent by the parents; the woman being of marriageable age; a mock abduction (with feigned resistance by the woman); and prohibited sexual intercourse during the abduction process.[502]

Notwithstanding its value, by enforcing a narrow view of culture and custom, the Western Cape High Court decision blatantly negates the custom as *lived* by Jezile and many other South Africans. The essentialising of Black customary practice is a

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[497] Ibid.

[498] Ibid., para 78.

[499] The Commission for Gender Equality, Rural Women's Movement, Masimanyane Women's Support Centre, and The Commission for the Promotion and Protection of Cultural, Religious, and, Linguistic Communities.

[500] *Jezile* para 79.

[501] Ibid., para 95.

[502] Ibid., paras 72-73.

consequence of culturalism; for the "idea of culture demands localization; it demands that distinctions be clearly demarcated at the expense of the scalar messiness of social interaction."[503] As I rejoined following the issuance of the judgment:

> Jezile's own views…most clearly show how the subject of *ukuthwala* still remains a complicated territory; and what a great disconnect exists between many South Africans who sustain certain forms of living customary law, and those who may speak on their behalf. The complainant's male relatives and Jezile's own brother and sister-in-law supported his actions. His methods comported with local perceptions of culturally sanctioned behavior. If the form of *ukuthwala* and marriage practiced by Jezile is not traditional, and is instead as the Court determined, "aberrant", we must subsequently ask: aberrant to whom?[504]

The interpretation of customary law espoused by the *Jezile* judgment follows the idealising predisposition of the *ukuthwala* script, as well as a preference for written customary law or interpretations by authorities and elites. Understandably, before 2009, a sizeable segment of the South African population did not know of *ukuthwala*'s existence – let alone the coercive forms of the practice – and consequently this unfamiliarity and shock in response to the practice filters into the *ukuthwala* discourse. The *Jezile* decision and the *ukuthwala* script conflate "customary" with "benevolence," as though violence or injustice is never perpetrated in the name of custom.

The Court need not have branded coercive *ukuthwala* aberrant in order to ultimately fall on the side of Yekiso, and the rights of women. It could have noted the established status of violent forms of *ukuthwala*, and then taken steps towards developing *ukuthwala* in line with Constitutional standards. The refusal, in the specific context of *ukuthwala*, to imagine custom differently prevents any further exploration of the customary prescripts

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[503]Mitchell, "There's No Such Thing," 12.

[504] Nyasha Karimakwenda, "Jezile Ukuthwala Judgment Signals Progress and Continuing Challenges," *Custom Contested*, 29 April 2015, http://www.customcontested.co.za/jezile-ukuthwala-judgment-signals-progress-and-continuing-challenges/.

that both enable and conceal sexual violence within marriages. In the final section of this chapter, I consider these prescripts.

5.4 Documenting The Linkages Between Patriarchy, Customary Marriage and Violence

5.4.1 Questioning the Theme of Benevolence in the *Ukuthwala* Script

By demarcating the allegedly new and violent forms of *ukuthwala* as criminal and in contravention of established custom, civil society activists, and legal practitioners and scholars regard the assaults on girls and young women as anomalous acts by men who are blatantly abusing culture. As the preceding paragraphs make clear, the culturalist approach to determining the authentic form of custom adheres to official custom whose boundaries are determined by outsiders and elites. This approach denies that other realities do resonate as custom – even ones that offend Constitutional and human rights ideals.

What is unclear is why in the specific case of *ukuthwala*, benevolence is assumed to be part of the custom, with more harmful forms excluded as inauthentic. This stance is confounding, for there is already significant evidence regarding the patriarchal strands of customs, which official customary law rigidified. In customary succession cases of *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* the Constitutional Court struck down the apartheid era law provisions that codified the custom of male primogeniture.[505] *Shilubana*, concerning a chieftaincy dispute amongst the Valoyi Royal family in Limpopo, also addresses gender discrimination.[506] Here the Constitutional Court upheld the Valoyi's appointment of a woman as *Hosi* of the community, agreeing that it represented a development in living customary law. In *Gumede*, a customary marriage divorce case, the wife successfully challenged provisions of the Natal Code of Zulu Law and the KwaZulu Act on the Code

[505] *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

[506] *Shilubana and Others v Nwamitwa*.

of Zulu Law that granted men full ownership of the marital property, as well as custody of family members.[507]

The apartheid-era provisions struck down in *Gumede* and *Bhe/Shibi* starkly encapsulate how patriarchy was written into law, leaving less room for negotiation and contestation at the level of the community, and rendering Black women even more vulnerable in the eyes of the law and within their communities.[508] In *Gumede* the court noted: "Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable."[509] While these cases do not speak to physical and sexual violence, they symbolise an environment in which men's bodies and positions were privileged.

The status quo understanding of *ukuthwala* appears to be that, with focused attention on curing the present-day uncharacteristic violence, the customary practice can be restored to its original benign nature. But, the existence of violent *ukuthwala* cases cannot be divorced from the broader context of time-honoured patriarchy and the obligations ascribed to women in their roles as wives. The following section looks at how customary norms circumscribed the bodily autonomy of wives, making it far more difficult for sexual violence in marriage to be designated as unjust.

5.4.2 Searching for Patriarchy in Marriage

In this section, I make use of historical, ethnographic, and legal materials to convey that, although customary mechanisms existed to protect wives and norms dictated that wives be treated well, this was balanced against the uxorial rights that husbands held, and ultimately the fate of a woman lay in the hands of a man (whether it be her husband or male elders). As the previous section shows, it is important to bear in mind that many of the sources on customary law are presented through numerous filters (shaped by

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[507] *Gumede v President of the Republic of South Africa & Others* 2009 (3) SA 152 (CC).

[508] Ibid., para 17. Also see Chanock, *Law, Custom, and Social Order*.

[509] *Gumede v President of the Republic of South Africa & Others*, para 17.

colonialism and apartheid and other ideologies or methods), and do not reflect the unique and dynamic realities of communities. At most they are representative of overarching patterns.

To be clear, my argument is not that African custom or tradition is entirely patriarchal and impervious to change. Just as there are various forms of *ukuthwala*, there are various models of tradition, not all of them androcentric and patriarchal, and not all of them heterosexual. Ratele reminds us that, "even though there are hegemonic hetero-masculine voices within traditions, traditions themselves are not exhausted by such dominant voices."[510] Official customary law in fact suppressed competing iterations of custom that lessened the hegemony of tribal and family authorities.[511] Without that partnership between dominant men of different races, "the practices of young men and women, of divorcees and widows, all of whom struggled against aspects of the maintained patriarchy, would be clearly visible as custom."[512]

Within my present research, I narrow in on the masculinist exhibitions of custom that constrained wives. I do not delve into discussions of the meanings of consent that are central to the *ukuthwala* debate and have been articulated elsewhere.[513] In contrast, I de-centre *ukuthwala* to consider expectations placed on wives' bodies during the life of the marriage. Using ethnographic and historical literature, I broadly survey how male-centric customary norms and practice detrimentally impacted wives' rights to bodily autonomy. Patriarchy enabled and concealed sexual violence in marriage – not simply during the *thwala* process but across women's lives.

It may be helpful to begin by assessing general positions on the treatment of women in marriage in order to extract a number of tensions. This exercise is done with an

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[510] Ratele, "Masculinities without Tradition," 147.

[511] Chanock, "Law, State and Culture," 55.

[512] Ibid.

[513] Karimakwenda, "'Today It Would Be Called Rape.'"; Thornberry, "Ukuthwala, Forced Marriage."; Smit, "Rights, Violence."

awareness that the categorisations of peoples (Tswana, Xhosa, Sotho, etc) that feature in the academic sources, are colonial and apartheid constructs.[514] I use these sources only to proffer everyday patterns of patriarchy. I am cognisant that these are generalities and that women have always found creative ways to navigate patriarchal hegemonies and assert themselves.

Several ethnographers of the 20th century took pains to describe the benevolent side of marital relations and the structures that existed to ensure that wives were well treated, even though the wife held a subservient position to her husband. In regards to Tswana law and custom, Schapera found that "although a wife is thus under the legal tutelage of her husband, various rights and privileges must be accorded to her. It is his duty to respect her, and to treat her kindly and considerately."[515] He continues: "The husband's power over his wife is by no means absolute. He may beat her if she has misconducted herself; but her own family's power, to which she can always appeal and flee, is generally an effective check against abuse of this right, while if he carries it to an extreme he may be punished at the *kgotla* (local court)."[516]

Amongst isiXhosa speaking groups, there were also protective mechanisms for wives, which existed alongside the husband's right to discipline his wife even by use of physical force as long as no "permanent injuries" were caused or "excessive blood" drawn.[517] The *uteleko* custom, described by JH Soga as essentially meaning, "don't you

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[514] The South African tribal groupings that are taken for granted in the present are the relics of not only apartheid racial classifications, but also 'sub-classifications,' which Smythe conveys, are an even more enduring symbol of the apartheid project. Of note, she writes, are the Population Registration Act of 1950 and subsequently the 1951 Bantu (later Black) Authorities Act, which produced "fixed tribal identities premised on race and tied into a defined territorial land mass". Dee Smythe, "Of Classifications and Sub-Classifications: A Response to Stone and Erasmus, and De Vos," *Transformation: Critical Perspectives on Southern Africa* 79, no. 1 (2012): 169-70.

[515] Isaac Schapera, *A Handbook of Tswana Law and Custom* (London: New York: Oxford University Press, 1955), 150-51.

[516] Ibid.

[517] van Tromp, *Xhosa Law of Persons*, 105.

dare" to a husband, acted to "guarantee…considerate treatment" of wives.[518] The wife would go to her own family's home where she would stay until the husband had done enough to appease them, typically by paying a fine.[519] Soga went so far as to state that there was no need for dissolution of marriages since wives could find support under Xhosa law and at their parent's homes.[520]

Customary marriages also emphasised two categories of rights: the sexual and domestic obligations of a wife (uxorial rights) which belonged to her husband, and (genetrical rights) relating to motherhood and childbearing wherein all children born of the marriage belonged to her husband's family (in patrilineal communities).[521] The uxorial rights granted the husband sexual access to his wife, and he could cite a wife's refusal to render conjugal rights as a basis for dissolution of the marriage; though under codified customary law in some jurisdictions, both sexes could use this justification.[522]

Although the ideal under official customary law was that wives be treated well, and if abused they could seek refuge from their families, the protections available were limited given the patriarchal features of local ethos.[523] A woman's fate invariably lay in the hands of a man. Under Pedi custom, where a woman was raped or assaulted she had to rely upon her husband or her male elder to seek recourse on her behalf.[524] Under Xhosa

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[518] Soga, *The Ama-Xhosa*, 273.

[519] van Tromp, *Xhosa Law of Persons*, 151-56.

[520] Soga, *The Ama-Xhosa*, 284.

[521] C.R.M. Dlamini, "A Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society" (LLD diss., Faculty of Law, University of Zululand 1983), 191; Eleanor Preston-Whyte, "Kinship and Marriage" in *The Bantu-Speaking Peoples of Southern Africa*, ed. William Hammond-Tooke (London: Routledge and Kegan Paul, 1974), 187-88; Bennett, *A Sourcebook*, 245.

[522] van Tromp, *Xhosa Law of Persons*, 97; for codified law, see for example, Section 76(1) of the former Natal Code of Bantu Law, Proclamation R195 of 1967, in which "continued refusal on the part of the other partner to render conjugal rights" was listed as grounds for divorce for both husband and wife.

[523] Bennett, *A Sourcebook*, 262.

[524] H.O. Mönnig, *The Pedi* (Cape Town: National Book Printers, 1978), 320.

custom, dissolution of the marriage mandated the return of a portion of the *ikhazi* (lobola cattle), which required acquiescence on the part of her paternal family.[525] If the woman's father or guardian refused to support the dissolution, she would then have to seek help from her paternal uncles, with the Chief's Court as the final arbiter.[526] The process demonstrates a woman's dependence on her family to secure her protection. Bennett's insights also poignantly capture the vulnerability of women in scenarios of conflict:

> …customary law allowed only imperfect methods of enforcement; and it is in a procedural sense that the woman's vulnerability becomes more apparent. A husband's duties were of a moral or conventional nature; if he neglected them or abused his authority, his wife had no direct action against him. She was expected to appeal to her own father for protection; and his obligation was also nebulously conceived in morals and custom. As a last resort, the woman might appeal to her headman, but even in this instance she depended upon a man for her protection.[527]

A woman's inevitable dependence on a man placed her in a precarious position in instances of rape, especially in the marriage and stages leading up to marriage, like *ukuthwala*. Historical and ethnographic sources are useful for elucidating the relationship between marriage, familial demands, and sexual coercion. Put simply, as was apparent from the justifications provided for the marital rape exemption under common law, a wife's rights came second to the needs of the husband and the preservation of the marriage and family ties.

Due to the weight placed on marriage and family, under customary law "sexual assault was not consistently considered to be immoral, especially if it served a socially recognised purpose – such as precipitating marriage. The framework of marriage made it harder for the gravity of sexual violence against women to be recognised."[528] The different meaning given to sexual violence in marriage also rendered the abuse less visible to

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[525] van Tromp, *Xhosa Law of Persons*, 151-54.

[526] Ibid., 154.

[527] Bennett, *A Sourcebook*, 321.

[528] Karimakwenda, "'Today It Would Be Called Rape,'" 349.

outsiders, as wives were generally expected to endure it. The invisibility of the rapes perhaps makes clear why, apart from its connection to the subject of *ukuthwala*, marital rape appears to be a non-issue in academic sources. Bennett asserts that customary law "remains untouched by controversies (like marital rape and wife-battering)…that have been topical in the common law."[529] The virtual absence of discussions on marital rape in sources on customary law speaks volumes. It evidences how sexual violence in marriage was not in itself perceived as an injustice based on the uxorial demands placed on wives, as well the right of husbands right to use some measure of coercion to subordinate their wives. It also points to the erasure of women's experiences of violence in marriage.

Historian Elisabeth Thornberry's research on consent and rape in the Eastern Cape in the latter part of the 19th century sheds invaluable light on the obligatory subservience of wives and its relationship to marital rape:

> Men claimed the right to use force to command their wives' obedience, including the fulfillment of sexual duties – although…this right was substantially limited in practice by women's ability to seek refuge with their natal families…Women were expected to assent to their husbands' demands for sex; the concept of marital rape would not have made sense to residents of precolonial Xhosaland, nor did it form part of the ideas about custom that circulated in the early colonial era.[530]

Writing on the absence of rape in marriage in the historical record, Thornberry adds:

> Early colonial court cases contain numerous examples of women seeking to dissolve court cases on grounds of ill-treatment, including sexual abuse. One woman complained in court that her husband had attempted to insert a loaf of bread in her anus, while another told the court that her husband "never had connection with me once, but mauled me about in a most unmanly way." By contrast, complaints of simply being forced to have sex are conspicuously absent in these records, suggesting that such an act did not rise to the level of a legitimate complaint. In precolonial and early colonial Xhosaland, then, a discourse of custom defined and circumscribed sexual behavior – particularly

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[529] Bennett, *A Sourcebook*, 228-29.

[530] Thornberry, "Colonialism and Consent," 63.

> for women. The forms of sexuality condoned by custom…assigned control over marriage to women's families and male guardians.[531]

Thornberry's extensive research on sexual violence in the colonial Eastern Cape richly contextualises the ideas around marriage, sex and coercion that resonate to this day. The cases and records that Thornberry consulted confirm husbands' privilege (albeit moderated by the protective mechanisms), the condoning of sexual coercion within marriage, the palpable silence on the subject of marital rape, and the power that men generally wielded over women. As the cases of sexual abuse that came before the courts displayed, husbands sexually abused their wives, yet, the subject of marital rape was not squarely confronted or spoken since it fall outside the parameters of customary protection.

Thornberry did find evidence where women directly complained, but only in narrow circumstances where they were at liberty to do so: "… Xhosa women in polygynous marriages gained missionary support when they complained of marital rape more than one hundred and fifty years before South African law criminalized nonconsensual sex between spouses – albeit at the price of repudiating the validity of the marriage itself."[532] Thornberry's findings should not be taken to mean that rescue from marital rape was only possible within a missionary setting, but that seeking relief using customary support structures was a circuitous process given the silence around marital rape, the expectation that wives be sexually available to their husbands, and the family's control over a woman's marriage.

The literature which generically depicts the expectations placed upon wives at the communal level serves to place the violence of *ukuthwala* in context. Brutal abductions did not take place in a vacuum; they were part of a continuum of violence sanctioned under the banner of marriage. As an ideal, marriage was envisioned as a respectful symbiosis in which the husband holds more power but treats his wife in a considerate manner. But in tandem, a husband was granted the right to discipline and demand by force, this only

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[531] Ibid., 64.

[532] Ibid., 115.

being tempered by whatever support the wife's family provided. Custom did not wholly shield women from sexual violence.

Though culture is ever changing, and an ethos of rights is growing in South Africa, patriarchy is also a part of modernity. In her research on the construction of gender identities amongst formally-educated adults raised in Zulu polygamous families, Mkhize documented the tenacity of the notion of a reified patriarchal "Zulu culture" amongst some of her research participants.[533] Informants made statements such as: "Culture is culture. Women would be happier if they accepted that won't change"; and "A woman is below a man and that is what it is, no amount of time, money and education will change that certain fact."[534]

One informant, a woman, sent an admonition to Mkhize, warning: "Tell this young woman who is conducting this research that it is good that she is highly educated but she must remember her place as a Zulu woman in our Zulu culture."[535] Notwithstanding the lofty principles of the Constitution, a solid and broad human rights-oriented legislative framework, and the fact that women have greater access to education and financial means than they did in the past, hetero-masculine cultures within South Africa resolutely live on.

5.5 Conclusion

The critiques in this chapter are not offered to justify the gendered violence of *ukuthwala*, nor to lend support to a cultural relativist position from which culture can serve as a defense to abuse of women. The present research aims solely to show that state and non-state responses to *ukuthwala* are precariously facile. As feminist legal scholar Razack

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[533] Zamambo Mkhize, "Polygyny and Gender: The Gendered Narratives of Adults who were Raised in Polygynous Families" (PhD diss., College of Humanities, University of KwaZulu-Natal, 2015), 64.

[534] Ibid.

[535] Ibid.

propounds, "(u)ntil we can actually see…communities in all their complexities, we have little chance of making spaces less violent."[536] While at face value the initiatives of government, scholars and non-profit organisations appear resolved in protecting women and girls by narrowing in on the damages wrought by *ukuthwala* abductions, this chapter elucidates how these responses are motivated by a discourse that is conspicuously divorced from the reality of marital rape. The *ukuthwala* crusade and script operate from a place of culturalism, casting customary practice as one-dimensional and homogenous.

There are myriad erroneous assumptions about the nature of *ukuthwala* in the policy and legal realm, and the steps taken to curb the practice have had the effect of masking the mundanity of marital rape. Rape in marriage is not extraordinary; countless wives carry the physical and imperceptible scars of sexual abuse as they fulfill their quotidian roles and responsibilities. The sensationalised campaign around *ukuthwala*, which frames the rapes as atypical acts and attends to one age group, detracts from how sexual violence is not uncommonly countenanced prior to and within marriage.

At face value the *ukuthwala* crusade is praiseworthy, shedding light on practices that were heretofore mainly hidden from outside scrutiny. In spite of its meaningful intentions, the discourse emerging from law and policy discourse is narrowly tailored to suit a legal positivist outlook of the extreme forms of this cultural practice. These narratives are silencing. Historian Peires writes that "(a)lthough the mantra of 'custom' is frequently invoked as a universal panacea to solve all problems and cure all ills," certain applications of custom mark "the extent to which it serves as a mask, or even a blunt instrument."[537] By insisting on uniformity, and a reliance upon written text and human rights-oriented archetypes of custom, the *ukuthwala* script eclipses the numerous ways in which *ukuthwala* is practiced, and shuts out the voices which attest to the longevity and typicality of sexual coercion within familial and intimate partner settings.

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[536] Razack, "Imperilled Muslim Women," 162.

[537] Jeff Peires, "History Versus Customary Law: Commission on Traditional Leadership: Disputes and Claims," *South African Crime Quarterly* 49 (2014): 19.

Though custom is a variable entity, the dogmatism of the *ukuthwala* script perpetuates a dangerous fiction about the benevolence and homogeneity of customary practice. By yearning for a past that never existed, the current *ukuthwala* perspective that dominates policy and law developments disregards women's realities. The fiction exacerbates the already conspicuous silence around ordinary marital rape in literature and public dialogue.

There is much to be gained from a more subtle and critical analysis of the violence that accompanies *ukuthwala*. The more one moves away from the inclination to categorise, polish and tuck existences into discrete boxes, the greater room there is for the unearthing of women's voices hitherto unheard, and phenomena previously distorted or concealed by outsiders, or even insider elites. As I stated earlier in this chapter, marital rape is not exceptional, and no amount of theoretical whitewashing can undo it. The next chapter counters the whitewashing and brings to the fore some of the challenges faced by marital rape survivors in the Western Cape and Eastern Cape.

6 Chapter 6: Uncertain Journeys: Barriers to Recourse-seeking for Marital Rape Survivors

6.1 Introduction

For many survivors of marital rape, the journey from abuse to liberation is tortuous. It is rarely defined by precise and calculated decisions about the next steps to take and grounded in certainty about what sources will bring succour. Various stumbling blocks abound.[538] The unpredictability and difficulty of help-seeking for survivors arises from the fact that marital rape is unlike other forms of sexual violence and familial violence. It is bound up with a history of social, cultural and legal constraints on the female body; constraints that transformed a married woman into an ownable being that is easier to violate.[539]

The previous chapters have elucidated that the state institutional sphere entrenched an inferior position for sexually abused wives, a position that was only officially undone beginning in the early 1990s. Even following the criminalisation of marital rape in 1993, and despite the gradual progression of the law with respect to women's rights, judges continue to express qualms about the severity of marital rape. Further, the significant link between rape and the institution of marriage is absent from policy and academic discourses on *ukuthwala*. In spite of legislative, judicial and policy actions ostensibly aimed at protecting marital victims, the explorations of this thesis expose how state institutions have invisibilised marital rape.

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[538] In the American context, the literature sheds light on the isolating, frustrating, and tortuous nature of help-seeking among marital rape survivors, and how their decisions are shaped by numerous considerations. See Patricia Peacock, "Marital Rape," in *Issues in Intimate Violence*, ed. Raquel Kennedy Bergen (Thousand Oaks: Sage, 1998), 230; Bergen, *Wife Rape*; Hanneke, Shields, and McCall, "Assessing the Prevalence."; Frieze, "Investigating the Causes."

[539] Gqola speaks of how certain categories of human beings are "throwaway people" – people who are easy to violate. Gqola, "Brutal Inheritances," 211-13.

The profound state institutional dis-ease with marital rape detailed in the previous chapters evokes the hindrances that mark women's encounters within social institutions. The present chapter travels out of the policy and legal realm and into the social and communal space. Developing the subject of institutions' erasure of marital rape, I ask the question: In what ways do individual and local contexts hinder women's ability to seek recourse for marital rape? This chapter illustrates how social, cultural and community forces thwart women's efforts to secure safety, pushing marital rape further into a state of obscurity and placing women at greater risk of harm.

The chapter documents the meandering journey of marital rape survivors through the lens of community workers who possess extensive experience in guiding and counselling them, as well as two survivors of coercive *ukuthwala*. The in-depth interviews that I conducted with court counsellors, social auxiliary workers (lay counsellors) and Thuthuzela Care Centre (TCC) staff from the non-profit organisations (NPOs) Masimanyane and Mosaic, uncovered resonant descriptions of the paths of marital rape survivor clients.[540] Following the integrative model proposed by Belsky, I adopt an ecological approach to probe the conditions that circumvent survivors' help-seeking processes.[541] The ecological paradigm captures the multiplicity and interconnectedness of factors that shape individual experiences. The levels within the framework conceptualise an individual's embeddedness within their immediate and broader environments.[542]

In addition to the individual's personal history, the ecological approach assesses the individual's microsystem (family and social units); the macrosystem (the "larger cultural fabric in which the individual, the family, and the community are inextricably interwoven"); and the exosystem (which refers to structural factors such as socioeconomic

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[540] Unless otherwise specified, I will generally use the term "counsellor" to encompass the various forms of staff, because they all do forms of counselling.

[541] Belsky, "Child Maltreatment."; Edleson and Tolman, *Intervention for Men Who Batter: An Ecological Approach*; Heise, "Violence against Women."

[542] Belsky, "Child Maltreatment," 321, 27.

conditions, as well as larger social units).[543] The mesosystem also forms part of the ecological framework, representing the linkages between an individual's microsystem and institutions such as police, courts and social service institutions.[544] The value of an ecological approach lies in uncovering the intricacies and diversity of women's help-seeking processes.

Consequently, through the information provided by my informants, I seek to understand how individuals are socially positioned, to identify the relationships between the systems they are embedded in, and to portray how these interactions shape survivors' paths. In this chapter I will demonstrate how factors such as individual social and cultural conditioning, economic reliance on the husband, complicity by families and churches in the abuse, and finally, poor training and ignorance by police, all create a climate that stifles women's endeavours to obtain security.

As the staff described survivors' recourse-seeking stages, what became apparent is that most women address marital rape by happenstance. The facts of the sexual abuse and a realisation that the abuse constitutes rape primarily emerge through counselling, education and empowerment provided by the organisations. In this chapter I walk through the early stages of help-seeking to exhibit the circuitous process through which women come to acknowledge and seek recourse for the sexual violation of their bodies. I begin with the social and cultural impediments to women, transition to Masimanyane and Mosaic staff's initial engagements with survivors, and conclude by describing taxing interactions with police and court systems. This data is drawn from the NPO staff as well as the survivors (who are interviewees 13 and 14).

It must be noted too that although I use the term "marital rape," not all counsellors use that term when speaking to their clients or educating groups of women. For a multitude of reasons that will be discussed, formal rape terminology generally does not resonate with intimate partner violence survivors, especially at the start of their journeys.

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[543] Ibid., 320-21, 24, 27-28; Heise, "Violence against Women," 264-65.

[544] Edleson and Tolman, *Intervention for Men Who Batter: An Ecological Approach*, Chapter 6.

Counsellors instead focus on identifying behavioural traits of the husbands and the emotions of the survivor in order to elicit occurrences of sexual abuse. The counsellors then begin the education process.

As the study of marital rape has grown more sophisticated, the research stresses the importance of being sensitive to language and terminology around sexual violence in marriage.[545] The region and socio-cultural milieu in which one is immersed should determine the phraseology.[546] Further, as opposed to reading marital rape as a clearly defined act that fits neatly into legal definitions, survivors' realities lay bare that the acts of violence they are subjected to blend into one another and are intertwined. Hence it is more constructive to understand marital rape as a form of abuse occurring along a "continuum" of sexual and other violence, and this also leaves room for survivors' self-perceptions to develop and shift.[547]

6.2 Individual, Family, and Community Dynamics

6.2.1 "This Problem Has Been Hiding"[548]: The Pervasiveness of Marital Rape

The work that Masimanyane and Mosaic staff conduct with women confirms that marital rape commonly occurs amongst the married women whom they encounter. The subject is relevant to individually counselled clients as well as workshop participants. Certain counsellors related that during workshops, it is jarring for women to conceptualise of sexual violence in marriage as rape, indicating that they have experienced it but defined it differently (Interviewees 8, 10). In other words, sexual violence in marriage is not rare or unusual. Rape takes place as part of a wider structure of abuse: verbal, psychological, physical and economic. Interviewees explained that rape in marriage is a "big problem"

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[545] Martin, Taft, and Resick, "A Review of Marital Rape," 334-35.

[546] Representing different regions of the world, the contributors in the recent publication, *Marital Rape: Consent, Marriage, and Social Change in Global Context*, use a variety of terms including forced sex, sexual assault, sexual abuse, reproductive abuse, intimate partner sexual violence; Yllö and Torres, *Marital Rape*, 4.

[547] Kelly, *Surviving Sexual Violence*.

[548] Interviewee 3.

that "has been hiding," and is accepted as normal by women for a range of reasons that will be further explored in this chapter (Interviewees 3-9, 11-16).

Marital rape takes various shapes (Interviewees 1, 2, 6, 8, 9). Some of the clients reported that they succumbed to coerced sex out of a desire to prove to their husbands that they were not sleeping with anyone else. The perpetrators tend to impart blame onto the women, accusing them of cheating when they refuse to have sex. Women additionally recounted to the NPO staff that they submitted to the sexual violence in order to avoid physical, verbal and psychological abuse, which they perceive as worse. In cases where women refused sex, their husbands retaliated by beating them up.

The community workers also recollected cases of clients subjected to sadistic rapes. On the day that I interviewed one of the Mosaic TCC workers, she was deeply shaken by a case from her weekend shift (Interviewee 4). A 55-year old woman came into the centre, dishevelled, overcome with pain, and barely able to walk. For the past five to six years her husband had been raping her with a broomstick each weekend when he was drunk, and her broken down body bore the wounds of this recurring cruelty.

In another case reported to staff at one of the Mosaic court sites, a client told of how her husband asked her for sex late one night (Interviewee 6). She refused as she was menstruating. Her husband became incensed and began to swear at her and beat her. He retrieved a broom from the kitchen, broke it on her back and continued to assault her. Once he had finished beating her he declared, "Now I'm gonna take my sex. Remember one thing, I'm married to you." He raped her until five in the morning. This was not the only case that my informants relayed about husbands beating wives and then raping them for hours until drained, nor that demonstrated extreme sadism. One husband tried to force a hammer into the vagina of his pregnant wife saying "my penis is nothing, that's why you sleep around" (Interviewee 9).

The scenarios of marital rape shared by the informants disinters the extreme brutality that women endure within their marriages. This comports with the experiences reported by Kottler in her interviews with marital rape survivors, some of who had been

raped with weapons (bottles, brooms, knives), had been raped after being severely battered, and had been raped frequently (30 times per week).[549] In her study of divorced and married women in Mitchell's Plain, Cape Town, Boonzaier found that over half of the participants who she interviewed had been sexually abused by their husbands.[550] Paralleling the types of sexual coercion reported by Masimanyane and Mosaic, the women in Boonzaier's study recounted giving in to sex out of fear of sexual abuse, fears of threats of physical harm should they refuse sex, battering prior to being raped, and being battered for refusing sex.[551]

Cultural practices also fuel sexual violence in marriage as is evident in the context of *ukuthwala*. The Masimanyane staff who work in the *ukuthwala* project conveyed that rape took place in all of the cases they looked at in the specific rural locales where their project is based (Interviewees 15, 16). This coincides with findings from other ethnographic studies in the Eastern Cape affirming that rape is not an uncommon part of the *thwala* process.[552] That does not mean that sexual violence is part of abductions in every area in which *ukuthwala* is practiced; there is great diversity in the practice, contingent upon regional and temporal influences.[553] Nevertheless, there are areas where the coercive forms predominate.

Speaking to ukuthwala as practiced decades ago in their communities, my informants described the process as follows (Interviewees 11-14). After a woman is abducted she is taken to the homestead of the "husband" and kept in a room. On that day, or a few days after her arrival, a man is sent inside the room and directs her that they must have sex. This is when the abducted girl discovers who her husband is. Where the girl is strong and fights back, the peers of the husband hold her down in order for him to

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[549] On the subjective realities of wife rape, see Kottler, "Wives' Subjective Definitions," Chapter 7, 182-239.

[550] Boonzaier, "Woman Abuse," 65.

[551] Ibid., 65-70.

[552] Rice, "Ukuthwala in Rural South Africa," 398; Wood, "Contextualizing Group Rape," 313.

[553] Nkosi and Wassermann, "A History of the Practice."; Smit, "Rights, Violence."

rape her. Over generations, rape served the purpose of securing the marriage, for now the body and status of girl/woman was irretrievably transformed. Rape also had practical utility. To prevent the girl from running away the would-be husband would brutally rape her so that she was unable to walk due to the trauma to her underdeveloped body. In some communities, family and others stood outside of the room, listening to ensure that the marriage is consummated, if even by force. Another historical feature of the practice is that after taking the girls' virginity the man presented a cloth stained with blood to prove to the elders that the new bride was in fact a virgin.

When I asked the Masimanyane *ukuthwala* project staff whether the communities in which they conduct advocacy explicitly voiced that rape is a part of their *ukuthwala* practice, the staff looked at me with perplexed countenances (Interviewees 15, 16). They explained that community leaders do not meet and declare that rape is an accepted norm. The sexual violence simply happens and continues to happen over generations, and is organically established as an agreed upon practice. Addressing how violent forms of *ukuthwala* became entrenched, one of the staff of the Masimanyane *ukuthwala* project remarked: "And the way in which we have kind of understood it…in respect to referrals that we have done and having the experience of women, older women, *old*, *old* women and the younger generation, you will find that this pattern, or the way in which the practice is being done, it has been the same!" (Interviewee 15).

Mwambene and Kruuse's interviews with the family and community of Mvumeleni Jezile (the husband in the *Jezile ukuthwala* High Court case) in the Eastern Cape, are also revelatory. They bring into focus how, in the eyes of some communities, the institution of marriage nullifies claims of rape on the part of the woman. One participant they spoke to stated adamantly: "I want to emphasise the part about rape, he did not rape her, he was following his custom."[554] Resoundingly, the participants

[554] Mwambene and Kruuse, "The Thin Edge of the Wedge," 33.

appeared incredulous that a man could be convicted for rape since, according to their norms, marriage rendered sex consensual.[555]

The data provided by the informants at Masimanyane and Mosaic depicts the forms that sexual violence in marriage takes, and how it recurs from the beginning of marriage processes and throughout the duration of marriages. Their knowledge, and the literature make plain that the very deeply embedded social norms negate a woman's right to claim rape in marriage. What compounds women's inability to leave or resist is the fact that they have been inculcated into ways of thinking that privilege men's wants in marriage. I discuss this in the following section.

6.2.2 "They Thought Maybe it had to Happen That Way"[556]: Women Socialised to Suffer in Marriage

Culturally and socially enforced sexual entitlement held by men fuels the continuation of marital rape, and the erasure of the scale of the violence. Marriage gives men the right to demand and take sex by force, and by normative standards, this violence does not rise to the level of rape. Through advice passed on by elders, and the standards to which women are held in their respective communities, women enter marriages with the expectation that they are not equal to their husbands, and are instead beholden to him, and wider family directives (Interviewees 3, 8, 9, 11-12). The staff at both NPOs reported that women marry with little awareness of what their rights are. There is lack of consciousness in communities about what constitutes domestic violence and rape within marriage (Interviewees 3, 8, 9, 11-12). This is not to say that the language of the law and human rights is the only way that survivors should conceive of their experiences; it should not be. Rather, the goal of feminist work such as that of Mosaic and Masimanyane is to assist their clients in seeing their experiences in ways that privilege their own well-being and that foster safety and greater autonomy where possible.

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[555] Ibid., 32.

[556] Interviewee 3.

Not infrequently, the payment of *lobola* plays a determinative role in how women and men conceive of their rights and roles within the marriage. Studies in South Africa attest to the inexorable association between the payment of *lobola* and a husband's unfettered powers. In Singleton's ethnographic study in Mpophomeni township, located in the uMgungundlovu Municipality of KwaZulu-Natal, the subject of *lobola* featured prominently in distinctions made between rape and coercive sex. "Forced sex is demand of sex from my husband," one young woman clarified, "[but] I would never say 'My husband raped me,' because my husband paid *lobola* for me. My boyfriend paid nothing for me, so that is rape."[557] The three province Medical Research Council study in 1999 recorded that, although women's own personal views differed, 74% reported that their culture dictated that if a man paid *lobola*, it meant that the wife could not refuse him sex.[558]

Through my interviews, similar outlooks emerged. The counsellors relayed that women who have been married customarily through *lobola* tend not to conceive of forced sex as rape (Interviewees 3, 9). One Mosaic staff member recounted that some women thought that sex had to happen in this violent manner because the husbands would remind them that *lobola* had been paid, and therefore they could have sex anytime they wanted to (Interviewee 3).

There are clients who did not perceive of their husbands' behaviour as abuse; and were unaware of their ability to report their husbands for rape (Interviewees 2-4, 8, 9). The persistence of marital rape amongst Black and rural women was explained in racial and cultural terms: "… I think to us… you will find in our culture… the other languages are understand that this is rape, like a white people they will understand that this is rape. But to us, you know, it will not be easy especially those that are coming in rural areas" (Interviewee 8).

It is known that marital rape exists across all racial and economic groups, and the perception that marriage gives husbands a right to "sexual intercourse on demand" is not

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[557] Singleton, "The South African Sexual Offences Act," 67.

[558] Jewkes et al., "He Must Give," 8-9.

unique to South Africa, nor to Black South Africans.[559] Van der Westhuizen writes of how within White Afrikaans communities, a "discourse of denial buttresses intra-family violence."[560] Speaking to how some Afrikaans men hold violently enforced power over women, one of van der Westhuizen's informants stated, "(My mom of 70+ years old) says… 'If your husband has to have sex, my child, then you have to (oblige).'"[561] There are undoubtedly parallels across racial groups.

Notwithstanding commonalities, the perspectives of the NPO staff concerning rural Black populations foregrounds the consequence of language and naming at the individual and local level. Through her extensive work with survivors of sexual violence, Kelly underscores the magnitude of naming in survivors' healing and empowerment processes. She writes that, "In order to define something, a word has to exist with which to name it…The name, once known, must be applicable to one's own experience."[562] The NPO counsellors' opinions on whiteness implicate two kinds of naming. The first points to the absence of a locally resonant and internally derived vocabulary for sexual violence in marriage in some Black communities.[563] The second form of naming applies not just to Black communities but all survivors, and that concerns individual perceptions of violence. For a survivor to begin to acknowledge the abuse they must "develop names and definitions of sexual violence that accurately reflect… experiences from their own frames of reference."[564] This form of naming is not imposed; instead it comes from self-processing

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[559] For discussions of patriarchal entitlement and familial violence in Afrikaans communities see Christi van der Westhuizen, *Sitting Pretty: White Afrikaans Women in Postapartheid South Africa* (Pietermaritzburg: UKZN Press, 2017). Within the American context, see Raquel Kennedy Bergen, *Issues in Intimate Violence* (Thousand Oaks: Sage, 1998), 238.

[560] van der Westhuizen, *Sitting Pretty*, 164-65.

[561] Ibid., 161.

[562]Kelly, "How Women Define," 114.

[563] Recall from Chapter 5 that under the cultural and legal frameworks of some Black South African populations, rape in marriage was not recognised as a crime.

[564] Kelly, "How Women Define," 132.

and contemplation.

The counsellors repeatedly stressed that their clients do not have a name for what they are experiencing, and don't necessarily conceive of it as abuse even though it causes immense physical and emotional harm. This theme came through as counsellors described their clients' views in different ways: "They don't regard that as a rape"; "that man abused me for all these years and I didn't know it"; "they thought maybe it had to happen that way because this man would say, I paid *lobola*"; "the rape issue, it's like a normal thing." (Interviewees 2-4, 9).

The fact that survivors who do not have a name for the abuse still end up seeking help evinces the gravity of their pain. The clients are traumatised and worn down by the abuse, although they may not have the language to articulate it. In these scenarios, the counsellors play a role in drawing out the suffering (Interviewees 1-3, 6, 8, 9). A court counsellor from Masimanyane summed up her interactions with clients: "They don't think… that this is rape but emotionally it's hurt them," she said. She elaborated how one client had said, "Sisi… it was so painful when he took my underwear off, and then he didn't even took my underwear off, he just torn them, you know, and then open my legs… and then put his penis" (Interviewee 8). The counsellor then asked the client what she was doing during that time. The client responded: "I was just lying because he's gonna beated me, and then turn my face on the side, and then he carry on." The counsellor responded: "At that time doing that, how do you feel?" The counsellor continued, "'[y]hu Sisi'… she's crying, crying [she snaps fingers]. Then it's where I found that it's hurting them. Whether they don't regard that as a rape but it's hurt, it's hurt" (Interviewee 8).

By assisting the clients to connect to their emotions, the counsellors bring the pain of the abuse to the surface. This encourages the clients to accept that what they are subjected to in their marriage is hurting them. When a client describes the sexual abuse, another counsellor said that she asks, "how do you feel? How do you feel about that?" (Interviewee 9). As the client connects with her emotions, the counsellor begins to educate her, asking her "do you know what is rape?" This happens through counselling over several sessions.

Without an outlet, women endure extreme levels of violence and go for long periods of time in silence. When Masimanyane first began its *ukuthwala* work in Eastern Cape, the older women said that they supported the project in terms of its work with younger women and girls, but they had a specific request: "You must start with us because we are still carrying the scars of this practice… we are still there in these marriages… because of our children" (Interviewees 15, 16). It was only in their mature years that these women, through the intervention of Masimanyane, could feel safe enough to name the violations and ask for support.

Some women have enough self-awareness and courage to articulate their rights and to leave on their own (Interviewees 9, 10, 15, 16). In the past, women would enact cultural methods of protest such as entering and protesting in the in-law's kraal, or smearing excrement on their face.[565] Instances of protest aside, one point that Masimanyane staff consistently relayed is that [Xhosa] women "learn to stay in their marriages" (Interviewee 12). In the training that older women provide to young women entering marriage, they instruct them to obey and not argue with their husbands. Consequently, even if the marriage is unhappy the women persevere because perseverance is the marker of a good and respectful wife (Interviewees 8, 11-14).

6.2.3 "They Learn to Stay in Their Marriages"[566]: Family and Community Pressure and Ostracisation

The inculcation by elders ties in the role of family and the community at large in pressing women to remain in abusive marriages. There is an entanglement of constraints that deter women from reporting abuse or leaving their marriages. More often than not, women communicated to the counsellors that they had informed both families, but were

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[565] According to the practices of some isiXhosa-speaking communities, when a *makoti* (wife) is seeking to rebel against her circumstances, there are cultural acts she can do so that she is taken back to her paternal home. A *makoti* is not allowed to go into the in-law's *kraal*, but Masimanyane explained that especially in the case of *ukuthwala*, if a woman were brave enough, she would enter the *kraal*, do something bizarre, and then be taken back to her own family (Interviewees 15, 16). Also see van Tromp, *Xhosa Law of Persons*, 17, 33.

[566] Interviewee 12.

discouraged from seeking help, and began to distrust their own judgment (Interviewees 2, 3, 7, 9). Another issue is that where the man is the financial provider for both the wife and the wife's family, when the wives try to seek protection from their families they are turned away (Interviewee 3). The families retort that they received *lobola* and are not able to pay it back, so the *makoti* must return to the marriage no matter how horrible it is.

Families (both sides) also express scepticism that marital rape has taken place (Interviewee 2). They assume that because the husband is cheating or has moved on, the wife is using the rape allegation as revenge. For *ukuthwala* the possibility of escaping is extremely thin where the girl/woman's family was part of the negotiations. The families say: "No, we know you are there, that is your family now, that is your new family, you must stay there" (Interviewee 15). *Lobola* has been paid, and the male elders have already determined the fate of their daughters. Some survivors thought it futile to seek help from their parents (fathers especially), since they were responsible for them being abducted in the first place, knowing the forms of brutality that awaited them (Interviewees 11-14).

Fear of community perceptions and tainting the husband's reputation is also a factor in survivors' minds (Interviewees 3, 8, 9). The potential stigma of being a divorced woman, and a preoccupation with the husband's reputation, weigh heavy on clients' consciences. Clients have asked how they could move forward in their claims when their husbands are well known church ministers, or persons of high standing in the community. In instances where the husband is respected in the community, it is harder for the wife to be believed (Interviewee 3). Connected to this, churches also contribute to the abuse, and in fact, Masimanyane staff related that they have come across numerous cases of pastors abusing their wives, including sexually (Interviewees 8, 9). One woman reported to her church, that her husband – the priest of the church – was abusive. The church advised her to stay, telling her that everything would be fine (Interviewee 8, 9).

In rural settings where traditional authority structures are in place, women are at greater pains to secure assistance (Interviewees 11, 12). Masimanyane reported that if the family refuses to assist, a woman cannot speak on her behalf in filing a grievance within the traditional hierarchy. It is her family that has to approach the chief, and the road to

the chief is very long. There are many steps that must be taken. After the reporting to the elders, the case must then be taken to the *isibonda*.[567] As a rule, you must be represented by a male (an uncle, brother, father) in all the venues, and if you do not follow the right procedures before going to the chief, the chief's guards will send you back to your in-laws. Despite commonalities, the processes and options differ in communities, and there is variation in how people address disputes at the local level.[568] People draw from different institutions, for example using a mixture of civil law, criminal law and traditional institutions.[569]

The disinclination on the part of some traditional leaders to intervene is connected to the fact that they themselves are benefiting from the practice of *ukuthwala* (Interviewees 15, 16). At the Palmerton Child Care Centre in Lusikisiki, a safe haven for girls escaping *ukuthwala*, the Centre staff reported to Masimanyane that their lives are at risk because of the work that they do. They are upsetting the traditional leaders' determination to protect the practice as part of their culture, and to enjoy the benefits they receive from the practice. There are men gaining financially and otherwise from *ukuthwala*, and because of this, advocacy around *ukuthwala* poses a threat to their systems of profit.

Men hold considerable power over women in terms of the abductions, but women too benefit, for the hierarchies of power in rural communities are simultaneously tied to age. Based on her 17 months of ethnographic work in a Bomvana community of the Eastern Cape, Rice dismantled the assumption that *ukuthwala* is the "manifestation of an inflexible and hobbling patriarchy in which women are powerless."[570] She recounts cases where older women organised abductions for younger members of their family and by doing so significantly increased their social standing and standard of living.[571] In one case,

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[567] *Isibonda* is the isiXhosa word for a headman.

[568] See generally Mnisi Weeks, *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa*.

[569] Ibid., 61.

[570] Rice, "Ukuthwala in Rural South Africa," 392.

[571] Ibid., 392-395.

a widowed mother who had approved of the abduction refused to rescue her daughter from her abusive marriage until she learned that her daughter had been gang-raped by her husband and his peers.[572] Mfono also tells of a case where a mother allowed her daughter to be *thwala*-ed in order to profit financially.[573]

There are other barriers. In certain rural areas of the Eastern Cape, the stigma of being a divorcee or having run away from a marriage instituted through *ukuthwala* is consequential (Interviewees 11-14). According to cultural beliefs, when you leave a marriage, whether by running away or through divorce, you are labelled a failure. The community gives women who leave their marriages the derogatory name *mabuya kwendeni* and isolates them. Community shaming makes it difficult for organisations like Masimanyane to address marital rape. Women are reluctant to leave for fear of being victim to community disapprobation.

For young girls who are *thwelwe* there is also the question of where they fit in the community once they escape their marriages (Interviewees 11-14). If a girl returns home she enters a liminal space. As a young girl who was married and is no longer a virgin, she is not able to participate in age cohort events. She cannot wear the traditional mini-skirt, go to school, or take part in social festivities. Now carrying the status of *umfazi*,[574] she must wear conservative attire, such as the long skirt and other garments. A preponderance of the abducted girls that Rice interviewed were able to return home, but that is only because their families disapproved of the marriages.[575] While aware of their human rights to not be forced into marriage, the rest of the interviewees decided to remain in their marriages. Reporting their parents would "violate their obligation towards and love for their

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[572] Ibid., 396.

[573] Mfono, "The Custom of Bride Abduction," 78.

[574] A woman.

[575] Rice notes that it is hard to draw generalisations about why the families rejected the marriages, but she does provide some discuss some potential motivations. See Rice, "Ukuthwala in Rural South Africa," fn 52.

parents… the local structures of gerontocratic authority had far more bearing on their circumstances."[576]

Mirroring the inputs of the informants in the present study, the participants in Rice's research also communicated that to rebel against the marriage would ascribe them an unsettled and difficult status. One young woman whom Rice interviewed said that if she left her marriage, she would end up "child at home alone," meaning a child without practical and collective support from her family, an impossible state in which to exist.[577] Prior to the emergence of the *ukuthwala* crusade, a survivor whom Mfono interviewed also shared that she knew that her forced marriage was against the law and that she could seek help from social workers, but that without her family's support, community social workers would hesitate to become involved and risk upsetting her family.[578] In parallel with Mfono and Rice's findings, the voices of the women in this study clearly express how family and community relationships weave a constraining web around the lives of survivors; a web that survivors cannot easily extricate themselves from.

6.2.4 "And if I Do Decide to go, Where do I go?"[579]: Economic Insecurity

Compounding the indistinct and isolated status that may come with leaving one's marriage, there is also the very practical concern of finances. Throughout a survivor's recourse-seeking journey she is greeted by the prospect of not having financial support where she and her children have been economically dependent on the husband (Interviewees 2, 3, 6, 7, 8, 10). Husbands use this as leverage over their wives. They threaten that if they are reported to the police and go to jail, there will be no one to feed the family, no one to pay the bills, and the bank will take the house. Even when women do begin the process of opening a case, the staff reported that one of the central reasons that they withdraw is fear of financial insecurity (Interviewees 4, 5). The survivor will obtain medical treatment and trauma counselling, and then stop at that point. The

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[576] Ibid., 396.

[577] Ibid.

[578] Mfono, "The Custom of Bride Abduction," 79.

[579] Interviewee 6.

challenges of leaving the husband are augmented where the woman is living far away from her family. In Cape Town, where wives travel with their husbands from the Eastern Cape and have little social and material support apart from their husbands, the feasibility of departing the marriage is limited further (Interviewee 3).

Conveying the difficulties of moving away from the husband, a court counsellor from Mosaic stated: "It's very difficult for the victim to pack up and leave. There are so many things to take into consideration, so, people are staying there for years, and people die there. If they didn't get help quick enough, people are dying there" (Interviewee 7). Going to the shelter is not a long-term solution. Even though there are shelters for abused women in the Cape Town area, they are very full (the situation may differ in the Eastern Cape, and Masimanyane also established its own shelter). Although there are shelters that will take women in if they have children with them, the social auxiliary workers struggle to place their clients (Interviewees 2, 4). Moreover, even if the woman does find a place at the shelter, she is only allowed to stay for three months. The staff make attempts to find the clients a job while they are at the shelter, but they reported that this is difficult where the clients do not have the requisite skills.

Lastly, after a woman has stayed at a shelter for three months, she is barred from seeking sanctuary at other shelters in the area in future. There is a policy against "shelter hopping" (Interviewee 2). If a survivor stays in the shelter for three months and circumstances at home do not change, what does she do? And where does she go? These are the rhetorical questions that the interviewees presented, driving home the point that leaving the marriage may be an impossible option for their clients (Interviewees 2, 6, 7).

6.3 Seeking Recourse from Formal Institutions

6.3.1 Approaching Institutions: "They Come with the Presenting Problem"

A theme that recurrently surfaced during the interviews is that clients do not report sexual violence as their foremost concern when they come to the police, the courts, and to the NPOs. With the continuous physical, verbal, economic and psychological assaults on their beings, and the social tolerance of sexual violence in marriage, marital rape is not at

the centre of women's minds, choices and words as they enter institutions of recourse. They enter these spaces carrying untold trauma and an accumulation of iniquities, and only disclose the forms of abuse they perceive as being critical to their survival.

As court staff at Mosaic put it, "they come with the presenting problem," the problem they believe is at the core of their suffering, but which in actuality only represents a fragment of the broader amalgam of harms they live through (Interviewees 6, 7).[580] As I pressed interviewees to speak to the issue of sexual violence, their responses were telling. One social auxiliary worker declared, "no, no, no, no, no… it's not your core issue, the sexual thingy, it's the physical and emotional and psychological and *economical*" (Interviewee 2). The informants continually stressed that economic, verbal, and physical abuse are their clients' predominant concerns (Interviewees 2, 6-9).

Research on the implementation of the Domestic Violence Act (DVA) accords with the counsellors' observations. In dissecting applications for protection orders in Cape Town, Mitchell's Plain and George, Parenzee, Artz and Moult found that the two most common bases for seeking an order were physical and psychological abuse.[581] Economic abuse was listed as a basis more than sexual abuse.[582] Most of the applicants in the court cases they studied were wives seeking protection from husbands.[583] An empirical study on perceptions of marital rape amongst prosecutors and defence attorneys in Ontario, Canada also provides an interesting parallel. The prosecutors whom Lazar interviewed observed that sexual violence is normally not reported, however the rape surfaces as the

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[580] At Mosaic, staff related that some women are motivated to come to the courts when there is another woman involved. They want the courts to help them get rid of their husband's mistress, without delving into the mistreatment at home.

[581] Penny Parenzee, Lillian Artz, and Kelley Moult, *Monitoring the Implementation of the Domestic Violence Act: First Research Report, 2000-2001* (Cape Town: Institute of Criminology, University of Cape Town, 2001), 41.

[582] Ibid.

[583] Ibid., 27.

survivors testify about physical abuse in the marriage.[584]

As Kelly's continuum of violence illustrates, the forms of abuse "merge," which prompted one prosecutor in Lazar's study to rhetorically ask: "(H)ow do you separate out the horror, he is punching you in the face and he is raping you, it is all horrible, which one is more horrible and which one do you tell the police about?"[585] What the clients choose to articulate is based on what they deem central to their survival and well-being, as well as considerations of potential responses by authorities. Clients prefer to present issues that they believe the authorities will find easier to address, since the courts are perceived as hostile environments.[586]

Survivors are also reluctant to disclose experiences of marital rape due to the belief that a husband is entitled to sex. There have been cases where the woman will come for the protection order, asking the husband to stop beating her and insulting her, but if the court does ask about sexual abuse she will retort, "he's still my husband" (Interviewee 2). As sex is considered a private and sacred issue in some communities and households, the clients also feel deep shame and guilt in speaking of sex-related matters with their husbands – whether before the courts or in counselling with the NPO staff. Even after the protection order is obtained and the staff continue the counselling sessions with the client, when they ask the client whether she would like to address the sexual abuse, a typical response is, "[n]o Sisi, I only want to do this protection order, just him not to beated me again, I cannot say he must not sleep to me" (Interviewee 8). The interviewees were adamant that is it extremely rare that a client will say upfront that her husband is abusing her sexually (Interviewees 1-2, 6-9).

In circumstances where the client does not consciously articulate the sexual abuse, it typically surfaces out in one of two ways. The first, discussed in depth by Masimanyane

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[584] Lazar, "The Vindictive Wife," 27-28.

[585] Ibid., 27.

[586] Interviewee 2; Parenzee, Artz, and Moult, "Monitoring the Implementation of the Domestic Violence Act: First Research Report, 2000-2001," 107.

staff, is that women speak of rape in their marriage in passing (Interviewees 8-9). As they are articulating their unhappiness at home, the clients will mention sexual coercion casually – not to highlight that it is a discrete form of abuse – but to air their general frustration about the marriage. A counsellor at Masimanyane described it as such: "... if people are married… in their story they talk about that, saying that, 'yes, he is forcing me to have sex with him although I don't want to' but to this woman, it's not an issue, you see that, she's just telling me but I'm trying to educate her" (Interviewee 9). This pattern is emblematic of how women enter marriages with limited awareness of their right and ability to negotiate the terms of sex with their husbands. Where sex is designated as an unqualified right of the husband, wives are unable to characterise the coercion and brutality as abuse and rape.

Given the social and cultural barriers to recognition of rape in marriage, the staff who counsel clients refrain from using the term "rape" right away. Instead – and this is the second manner in which the issue comes into the open – the NPO counsellors walk the clients through the different forms of abuse and ask them questions about how sex takes place in their relationships (Interviewees 2, 3, 6-9). In the next chapter I delve into how clients are educated and empowered, but before that takes place, the counsellors must first ascertain whether there is sexual abuse and how it happens. A counsellor at Masimanyane relayed the gradual process:

> So then as you continue with her, you know, interviewing her, and give her counselling and… I didn't want, she, she wouldn't even say, "he raped me," (s)he will say "he slept with me without a condom and I was saying no, I was saying no and then he force himself to me," you know, she doesn't mention the name rape, or sexual assault, you know… So you will just continue with that person and then you will only state when you will assist her to write also that he abused her sexually and then it was not a first time, this thing it was continuous. But, what I'm trying to say, when they come, the women, they come for a physical abuse, and other form of abuse. Then, this, it will come after as a counsellor you dig and on the session, then it will come (Interviewee 8).

The task of drawing out the fact and nature of sexual abuse is thus a purposeful and sensitive undertaking on the part of the counsellors at Masimanyane and Mosaic. It

requires expertise, patience and empathy, and trust between the counsellor and survivor, for survivors bury the wounds of marital rape very deeply. Kottler's study attests to this. Some of the survivors she spoke did not tell their experiences of marital rape even within the shelters they were housed in where counsellors were available.[587] A few shared their stories for the first time during the interviews with Kottler.[588]

There are cases where the physical trauma of the rape is so apparent that it must immediately be addressed (for example the TCC client raped with a broomstick). I return to the story of the Mosaic client whose husband had beaten her with a broom and raped her overnight after she refused to have sex with him because she was menstruating (Interviewee 6). That woman initially sought help for her injured finger at a pharmacy. The chemist looked at her finger with concern and advised her to go to the hospital as it looked like her finger was broken. That physical injury prompted her to go to Mosaic on the Monday. Apart from such cases of evident physical injury, the norm is that the counsellors play a vital part in bringing sexual abuse in marriage into the open.

6.3.2 Police and Court Environments and Responses

Each survivor's experience with government bodies is influenced by the levels of training, resources and personal inclinations of the state authorities they encounter. As Street Level Bureaucrats (SLBs), lower-ranking members of the South African Police Service (SAPS) and court clerks (who represent the Department of Justice), are essentially the face of their respective institutions as they directly engage with and provide services to the public.[589] The decisions of these state actors are a determinative factor in whether and how citizens are able to access government resources. It is tempting to read SLBs through a homogenising lens – to see them either as fully embodying and applying that which is

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[587] Kottler, "Wives' Subjective Definitions," 248.

[588] Ibid., 107.

[589] Street Level Bureaucracy theory stems from the discipline of sociology, and there are various models postulating how they should ideally operate to best serve the public. It is often associated with the foundational work of Michael Lipsky. Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (New York: Russell Sage Foundation, 1980).

mandated by directives and laws, or alternatively to perceive them as subjective human beings who act based on prejudices and preferences. In implementing a more adaptable view of SLBs, Moult comments that, "viewing street-level bureaucrats as either 'state-agents' or 'citizen-agents' would seem to be artificial and polemic."[590]

In her study of the how court clerks in South Africa exercise discretion in domestic violence cases, Moult established that court clerks are in actuality both "gatekeepers and rights keepers." On the one hand, they endeavour to "provide that 'maximum protection from violence' for the largest number of complainants, including in some cases, clients who did not immediately seem to qualify under the Act."[591] On the other hand, the "severe systematic constraints" in which clerks work (safety risks, busy courts, limited court staff, and lack of physical resources), compounded by subjective re-shaping of which cases are "legitimate," means that access to justice is uneven and locality-dependent.[592]

In line with Moult's position, while I address the shortcomings of the state institutions, my research also highlights their good intentions and efficacy. The present chapter and the subsequent one characterise the seemingly contradictory nature of police and courts. I draw out these inconsistencies to provide context for the diversity and at times unpredictability of clients' experiences.

6.3.2.1 Lack of Police Training: "They Don't Know, they're coming from the Camp"

Both Masimanyane and Mosaic have partnerships with Magistrate's Courts and SAPS. As a result of these partnerships, some of their offices are located right in/adjacent to the police stations and courts, and they work together with the authorities to provide services to clients. At times the SLBs rely heavily upon the organisations. The court clerks and SAPS – including the police staffing the Domestic Violence office at police stations –

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[590] Kelley Moult, "Gatekeepers or Rights Keepers? Domestic Violence Court Clerks and the Administration of Justice in South Africa" (Phd diss., Faculty of the School of Public Affris, American University, 2010), 16.

[591] Ibid., 202.

[592] Ibid., 199-200.

send clients straight to Mosaic or Masimanyane for advice and for assistance with filling out forms and writing affidavits. Interviewees noted that a certain locales it is as though they are expected to do the authorities' job for them. Another interesting aspect of the NPOs' work is that in the past they conducted training for the police, educating them about protection order procedures and other matters. Some Mosaic offices no longer do these workshops and one counsellor remarked that presently police are not as well informed about protection orders (Interviewee 3).

The lack of police training and transfer of knowledge concerning domestic violence procedures is a source of apprehension within the organisations, for it means that the NPOs are constantly performing the role of watchdogs, calling attention to, and rectifying mistakes and ignorance on the part of the state actors (Interviewees 3, 4, 8, 9). Nonetheless, there are police stations that perform better than others. In both the Western Cape and Eastern Cape locations, informants remarked that the police attending to persons who walk in to the stations are usually fresh from training camps. Stationed at the front lines so to speak they must follow through on established procedures which are designed to protect domestic violence victims, yet these police exhibit a blatant naïveté about what they are mandated to do.

The danger is that some police proceed based on their own assumptions about domestic violence procedures, or they follow the erroneous procedures that have taken root at their stations (Interviewees 3, 8, 9). A counsellor at Mosaic said that one gross misperception is that protection orders expire (Interviewee 3). When women take the order to the police so that it can be enforced, the police tell them it has expired. That Mosaic office has been battling this issue for years. The counsellor explained the police do not understand that once it is granted by the court, the order is "permanent up until you die."

Prior to the intervention of Masimanyane staff, at one of the local police stations the police tended to serve the interim protection order and let the perpetrator sign it, without issuing him the return of service (Interviewee 9). Following the issuance of an interim protection order by a Magistrate, the court cannot proceed – and therefore a final

order cannot be issued – unless there is proof of the return of service. The NPO staff have been compelled to teach the police how to read protection orders and how to follow the correct procedures.

Police officers are not without their own concerns about their limitations. Some come to the NPO staff for assistance, exasperated with being ill-informed about what their job entails. A Masimanyane court counsellor recounted that the officers say: "(W)e really, really don't understand this Act of Domestic Violence, especially how to serve the protection order, because when these trainings come to the province, the Station Commissioners will go by themselves, will take all those police that are in a higher position to go and attend that training." (Interviewee 9). The police in higher ranks who go to the training do not update the rank and file members about what they have learned (Interviewees 3, 9). The current state of affairs results in the newer officers remaining confused about how to properly carry out their duties, for example, how to serve the return of service (Interviewee 9).

While there are explicit laws, directives and rules in place to ensure the efficient and impactful operation of the police force, at the local level the implementation is flawed and haphazard. Although South Africa is 24 years into its democracy, the SAPS remains beset by myriad inefficiencies.[593] The study on the investigation, prosecution and adjudication of rape cases in South Africa report (RAPSSA) released in 2017 found that in 50% of the rape cases, the investigating officers were of the lowest rank, yet they are the ones who have the least amount of training and resources.[594] There is clearly a dire need for better police training and advocacy, for at present survivors cannot rely upon the promises carved out in writing by the state.

[593] Machisa et al., *Rape Justice in South Africa*.

[594] Ibid., 53.

6.3.2.2 "She's Fighting a Losing Battle"[595]: Challenges within the Justice System

Despite their best intentions, a portion of police officers fail to enforce the laws properly due to lack of training and education. Simultaneously, some act from a place of patriarchy and apathy. SAPS have a duty to accede to the requests/preferences of victims, and to efficiently and responsibly investigate cases that are filed, but they do not consistently do so. Between lack of police training, resource constraints and the prejudicial motivations, the conduct of SAPS routinely falls short of the standards set out the National Instructions. In addition to the substantive protections laid out under the existing sexual offences and domestic violence legislation, the Sexual Offences Act of 2007 (SORMA) mandated that the SAPS National Commissioner develop directives to police for how they should handle sexual offences cases.[596]

The relevant National Instructions 22/1998 and 3/2008 are comprehensive in scope laying out in meticulous detail how victims should be treated, and the protocols that the investigating officer and other SAPS actors must follow to ensure that cases proceed smoothly through the system.[597] The Instructions are also designed to ensure that victims are treated with dignity and not exposed to further harm and victimisation. While some SAPS locations and individuals commendably carry out their duties, the experiences of my informants point to some of SAPS's weaknesses.

The NPO staff described how front-line police officers and detectives discourage marital rape survivors from following through on the courses of action they have identified for themselves. SAPS do not take the claims of marital rape seriously, showing scepticism and disdain when women assert that their husbands have raped them (Interviewees 3, 8-10). They ask, "how can your husband rape you?" and utter other disparaging remarks that make survivors reluctant to engage further with the criminal justice system (Interviewees 8, 9). It is not just at the level of SAPS that marital rape myths persist. The

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[595] Interviewee 2.

[596] Section 66 of the Act.

[597] For a thorough overview of what the National Instructions require, see Smythe, *Rape Unresolved*, 35-38.

RAPSSA study found that prosecutors are reluctant to take marital rape cases forward, and that the conviction rate in intimate partner cases is lower than in stranger rape cases.[598]

There are known detectives who refuse to open any cases for rape, let alone marital rape. This happened at one of the stations that Mosaic works with. During one December month, there were no cases of rape filed, which prompted Mosaic to report the offending detective to his superiors (Interviewee 4). Some authorities simply do not want to engage in the work necessary for building a marital rape case. Aware of the fact that such cases are emotionally charged, and the victim may eventually withdraw her complaint, the detectives persuade the women to drop their cases earlier (Interviewees 8, 9). They ask the woman who will support her and her children.

Another routine deterrence method by SAPS is to pressure a woman to file a protection order instead of laying a criminal charge (Interviewee 8). They have said to clients: "No, at the moment, it's your husband, go and do the protection order," exhibiting the discriminatory belief that abuse in the family is a private matter not worthy of intervention by the criminal justice system (Interviewee 8). In conjunction, the police appear to hold the view that the woman should not take any decisions that would jeopardise chances of reconciliation with her husband. The trite reasons raised by Parliamentarians in the 1980s against the criminalisation of marital rape are brought to life again and again at the local level.

The literature also indicates that the courts do not place adequate emphasis on sexual violence when applicants seek protection orders, which corresponds with survivors' reluctance to open up about sexual abuse when engaging with the criminal and civil justice systems. In their study of the implementation of the DVA, Parenzee, Artz and Moult noted that magistrates only rarely made any orders with respect to sexual abuse in cases where it was cited in the applicants' affidavits. The statistics reflect this disparity:

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[598] Machisa et al., *Rape Justice in South Africa*, 31.

> "No orders were made against sexual abuse in Cape Town or George in spite of the fact that sexual abuse was noted in 20 affidavits and requested in 2 cases in Cape Town and noted in 7 affidavits and requested in three cases in George. Mitchell's Plain made 7 orders against sexual abuse, where this was mentioned in 19 affidavits and requested in 3 cases."[599]

The findings reflect the continuity of state actors' unwillingness to take sexual violence in intimate relationships seriously.

At the same time, the state of affairs within the justice system is varied, and rape myths do not invariably come into play. Smythe's attrition study found that "police are now less concerned with who reports… than they are with how the victim comports herself as a responsible and engaged 'complainant' throughout the process."[600] Also, the RAPSSA report documents that, of the investigating officers they interviewed, female and younger ones held more gender equitable views, and were less beholden to rape myths than male and older investigating officers.[601]

Depending on the region of the Eastern Cape within which they work, my informants imparted different perspectives on whether girls who were *thwelwe* and raped are reporting perpetrators to the police. In some locations, with greater awareness of their rights, girls are reporting and the police are intervening, which has acted to discourage men from abducting (Interviewees 11-14). In contrast, the *ukuthwala* project staff at Masimanyane state that the abductions they know of have not been reported to the police (Interviewees 15, 16). In her time in the Eastern Cape, Rice learned of just one case in which the *ukuthwala* survivor did report her husband to the police. Within that community reporting to the police was anomalous, however in this instance the sexual violence against the wife was conspicuously heinous, and the husband and his peers were convicted for gang-raping her.[602] This means that for communities such as the one in which Rice

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[599] Ibid., 42.

[600] Smythe, *Rape Unresolved*, 190.

[601] Machisa et al., *Rape Justice in South Africa*, 74.

[602] Rice, "Ukuthwala in Rural South Africa," 396.

conducted her study, ordinary rapes are not reportable offences. The sexual abuse must rise to such an excessive and dangerous level so as to warrant police involvement.

On the occasion that *ukuthwala* is reported to the police, the cases are unlikely to result in arrests let alone prosecution. Statistics provided by SAPS to the Parliamentary Select Committee on Women, Children and People with Disability exhibit that in 2012/3 out of the 255 *ukuthwala* abductions reported nationally, only 21 led to arrests.[603] There are various factors which push cases out of the criminal justice system and back into community structures where traditional authorities or elders will ultimately determine the fate of the survivors. Research undertaken in rural parts of the Eastern Cape determined that police and prosecutors are hesitant to interfere in what they deem "cultural" matters, preferring for them to be settled according to customary processes.[604] One issue that hinders prosecutions is the framing of the crime. A girl will say she was *thwelwe*, without detailing the rape and force, and because *ukuthwala* is not per se a crime, the authorities decline to prosecute.[605] Further, it has been reported that in some areas, both authorities and communities resist prosecutions. In one case that legal researchers learned of where an act of *ukuthwala* was taken to court, the community came and caused a commotion in the courtroom.[606]

Displaying local resistance to the prosecution of violent acts associated with *ukuthwala*, Jezile's community reported that the outcome of the Western Cape High Court case would have been different were the case held Engcobo and not in a "white man's" court (in Cape Town).[607] In Engcobo, locals proclaimed, "(c)ases like this one are common

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[603] Rebecca Davis, "When Culture and Policing Collide: Circumcision Deaths and Ukuthwala – Unpunished Crimes," *Daily Maverick*, 11 October 2013, https://www.dailymaverick.co.za/article/2013-10-11-when-culture-and-policing-collide-circumcision-deaths-and-ukuthwala-unpunished-crimes/#.W0NdrKmLljs.

[604] Mgidlana, "Should South Africa Criminalise Ukuthwala."

[605] Ibid.

[606] Ibid.

[607] Mwambene and Kruuse, "The Thin Edge of the Wedge," 34.

in this area, but you don't hear too much hype about them, because magistrates, prosecutors and defence attorneys who deal with these cases are familiar with and understands our customs, it's not like it's something new to them."[608] In light of the local dynamics, outcomes such as the one in *Jezile*, where the accused was convicted of rape, trafficking and assault, are anomalous.

6.3.2.3 The Limitations of Legal Processes and Remedies

Once a survivor has succeeded in getting a final restraining order or taking her case to criminal court, the obstacles do not cease. She is exposed to secondary victimisation as the husbands discredit them in court, or they are unable to provide solid proof of the rapes to sustain their claims (Interviewee 2). Bolstered by the power of their status as husbands and as men, the accused ask the court: "How can I rape her? She's my wife. How can she say I raped her, she was giving me willingly sex." (Interviewee 2). The likelihood of being disbelieved, the inability to present concrete proof of the abuse, and castigation (especially when not separated from the husband) creates a disenabling environment for wives seeking recourse.

Describing the detriment of secondary victimisation a Mosaic counsellor stated the following: "Because to her it seems now, she's fighting a losing battle, because people think she's crazy… how can she prove that this man has brutally raped her? Maybe she don't even have money to go to a doctor" (Interviewee 2). The counsellor also commented that wives are more willing to move forward with cases if their husbands have left them. That prompts the survivors to be more assertive. She further recollected that in some circumstances the case is treated more as a stranger rape, as opposed to an intimate partner rape where the husband raped the wife after a period of separation. At the same time, these potentialities exhibit the weight of rape myths for it is the cases that are more akin to the real rape template that have a greater chance of succeeding.

The comment about survivors not being able to afford a doctor evokes the structural hurdles that women must overcome in order to get help. In Eastern Cape,

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[608] Ibid.

travelling from a rural area to a police station or court in the nearest major city is prohibitively expensive. Survivors spend about R50 for a return fare to East London, which is an excessive amount for someone who is unemployed. One of the main courts stops taking forms at 12 noon, so that even where a woman has arrived at quarter past 12 she is directed to come back the next day. As there is a shortage of magistrates in some areas, the courts are struggling to keep up with cases and this is why they stop taking forms earlier in the day. For the unemployed woman who must spend R50 return fare from the rural areas, the act of taking the first step at the court or at the police station consequently demands sacrifice in terms of time and already limited financial resources.

Finally, at the end of the day, a protection order is a piece of paper, and its force lies in the survivor claiming her rights, the state securing them, and the perpetrator complying. All of these factors must be present in order for the protection order to do its work. On the day before one of my interviews with a Mosaic court counsellor, she was laying out the particularities of a protection order to a client:

> I said you're here for a protection order, you remember this thing is not gonna work on its own, you have to put it in place. You have to lay a complaint, but you must also remember that the protection order can go two sides that it can go. It's either he can understand and realise that what he's doing is wrong, it's against the law, or, he would come to the conclusion that he's busy losing control because you're busy taking control back over your life and then it can escalate, and he can kill. That's the possibility and that's a very big possibility. And it do goes to that extent (Interviewee 6).

A conclusion drawn by one of my interviewees is that the only way women can be absolutely safe is if the perpetrators are indefinitely locked up in jail (Interviewee 3). There is much that can go wrong with a protector order, or other legal action, as some men are so violent and determined to control their wives that state interventions do not frighten them. This is why leaving the perpetrator is a very dangerous act. In Kottler's interviews with 20 survivors, eight of the women's lives were threatened when they disclosed their intention to leave, and several informants were raped after leaving/divorcing.[609] At

[609] Kottler, "Wives' Subjective Definitions," 205, 12-13.

Mosaic, a counsellor told a disturbing story of a woman who obtained a protection order against her husband (Interviewee 3). While she was making a phone call at a public phone booth, the husband came with a hammer and hit her to death. "You see," she said to me, "sometimes you're dying having your protection order on your hand." With intimate partner violence, the prospect of death at the hands of their husband or boyfriend looms over a woman's present and future, an eventuality the law cannot prevent.

6.4 Conclusion

Through the distillation of the critical themes that surfaced from my discussions with the Mosaic and Masimanyane staff, the present chapter begins to capture the innumerable limitations that influence and mould the help-seeking behaviour of the marital rape survivor. By exploring women's help-seeking behaviour through an ecological framework, the research threads together the range of social, cultural, economic, and legal curtailments that women confront throughout the length of their endeavours. The barriers are high and consequential. Just one of the hurdles is sufficient to derail a survivor's attempts to find reprieve from harm, yet in most cases the survivors must battle many barriers at once or in succession.

South African women are carrying enormous levels of trauma, their lives steeped in violence. It is in their homes and the neighbourhoods that they live in. The result is that, as Lazar puts it, "sexual violence by the husband is hidden behind events of battering and veiled by a broader framework of physical, emotional, and economic abuse."[610] Moreover women are inculcated to maintain subordinate positions to their husbands as a result of socialisation and cultural norms, which further obfuscates survivors' ability to conceive of sexual abuse as rape and to speak out.

The formal and informal institutions implicated in the research – families, communities, traditional authorities, police stations, courts, etc. – are far from homogenous in their compositions, ethos, and functioning. They are not wholly

[610] Lazar, "The Vindictive Wife," 27.

patriarchal and hostile to rape victims, and marital rape victims in particular. They all have the potential to contribute to greater safety for women; but, the aim of the present chapter has been to document the manner in which the institutions fall short.

Social and cultural notions of rape reject marital and intimate partner sexual violence as wrongs that must be remedied. In so doing these notions tuck the commonness and magnitude of marital rape away. This is why a Mosaic counsellor declared, "this problem has been hiding" (Interviewee 3). Family elders, traditional authorities and churches are complicit in the sexual violence (whether stemming from the *ukuthwala* or occurring during the life of the marriage) preferring reconciliation, silence or avoidance. The police do try but regularly lack the knowledge to effectively implement protection order procedures. Worse are the cases in which the police, detectives and prosecutors simply dismiss marital rape claims as ridiculous or trivial; or are plainly unwilling to move such cases forward because of the paperwork entailed, or the chance that the wife may drop the charges.

It is difficult for a woman/girl to find security by herself. If she is brave enough to step out, she risks ostracisation by her family and surrounding community. She may become a pariah or find herself unable to fit in with age mates. Along with those issues, she must consider basic sustenance: food, shelter, and money. Weighing up all these factors, she may remain beholden and confined to the institution of marriage.

The picture is not entirely bleak however, as the next chapter demonstrates. The very same institutions discussed have the capacity to facilitate or enforce justice or at least some measure of improvement in the lives of marital rape survivors. The NPOs are a steadfast influence working in groups or one-on-one with women, playing the role of intermediary between the victims and the state institutions, and advocating where the state authorities fail to fulfil their duties. And finally and most pivotally, women's individual awakenings, exasperation, and determination bring about change in forms that are bold as well as understated.

7 Chapter 7: Awakenings: Bringing Marital Rape to the Surface and Finding Recourse

7.1 Introduction

The prior chapter illustrated how the recourse-seeking paths of victims are not smooth, but instead are laden with hurdles and diversions. The paths are also highly individualised. Yet, amidst the interplay of hindrances, some women are able to successfully change their circumstances for the better. Consequently, in this chapter I answer the question: In the face of silence surrounding sexual violence in marriage, what forms of recourse do women draw upon that positively impact their lives? This examination is critical for discerning options that may not be well documented in present literature on marital rape in South Africa, as well for highlighting the pivotal work of non-profit organisations and the significant potential that state institutions hold in protecting women from violence.

Masimanyane and Mosaic, the two non-profit organisations (NPOs) that I conducted research with, adhere to similar philosophies in their practice. Both organisations are feminist and attuned to women's rights norms. They do not dictate to clients the courses that they should take, nor judge clients' past and present decisions. Their primary goal is to empower women so that they are able to make decisions on their own and implement sustainable progress in their lives. Some clients arrive at the institutions with assertiveness and clear sense of what they want to ask of the NPOs. On the other hand, given the prevailing social and cultural norms attached to intimate partner violence, through their encounters with Masimanyane and Mosaic, clients are exposed to a different way of seeing their experiences. They can find resonance with a new language for describing their pain, and be in a safe space in which they can explore their emotions, well-being, and options for bettering their lives. Through the counselling and empowerment processes, over time clients act with greater confidence, awareness and intention.

In light of the fact that Mosaic and Masimanyane staff members are the primary informants for my research, the outcomes that I detail in this chapter closely mirror the processes and ethos of these organisations. I walk through how clients are able to find greater security engendered by the advocacy, counselling, and oversight roles (with respect to the police and court systems) of the NPOs. In so doing, the types of recourse that survivors find meaningful become apparent. Concepts of relief and justice are personal to each survivor. Some stay in their marriages, and the relationships grow healthier as a result of a shift in the survivors' mindsets and actions. What the informants stressed is that internal work is essential; the slow and sustained process of counselling and encouraging the clients to think differently about themselves and their circumstances. The measurable milestones of protection orders, arrests of husbands or divorce provide a beneficial compliment to the survivors' well-being, but they do not represent the totality of their healing and triumphs.

In the following sections, I commence by chronicling the psychological and cognitive developments that take place during the survivors' journeys within the environments of safety and empowerment provided by the NPOs. The clients start to unlearn disempowering long-held beliefs about marriage, gain awareness about what constitutes abuse, and begin to accept the right to dignity and equality in the marriage. The "remembering and redefining" of the abuse is central to empowerment, for "(i)n acknowledging abuse, women are able to look at and find ways of coping with its effects. They are also likely to develop precautionary strategies in order to prevent further abuse. These strategies involve taking more control over their lives and choices."[611]

As a complement to the descriptions of awakening, the last section looks at external remedies, highlighting the forms of recourse that wives seek and receive through the criminal justice and civil legal system, with the NPO staff acting as facilitators and advocates throughout. While the research concentrates on remedies that are mainly facilitated/observed by the NPOs, this does not mean that wives lack means of coping

[611] Kelly, "How Women Define," 131.

with marital rape. They do, and their daily survival often depends on these strategies.[612]

The layout of the initial sections parallels the three conventional stages of help-seeking (acknowledging and defining the problem, taking the decision to get help, and choosing a source of help).[613] In addition to documenting the kinds of steps women take, my aim is to delineate the individual, social, cultural and structural drivers of women's journeys.[614] This ecological approach to analysing women's help-seeking behaviour concerning violence does not solely focus on "what women in violent relationships *do,* but "rather… *how* they interpret their violent encounters, or *how* these interpretations affect their process of help-seeking."[615] The previous chapter outlined how women interpret the violence in their marriages, and here I consider the range of actions and developments that flow from their internal processes as well as social, cultural and material conditions.

7.2 Reaching the limit of Tolerating Violence and Abuse

The vignettes of Chapter 6 detail the forces that precipitate women's searches for help outside of their homes and families. There comes a time where a woman's body and psyche can no longer tolerate the assaults, and she is propelled to act. At times, some women gather enough courage so that when they arrive at the NPOs or the police station they declare in determined and unequivocal terms that they were raped by their husbands and want to file a case (Interviewees 3, 8, 9, 10).

For others, the call for help is triggered by the condition of their own bodies; the scale of the physical injuries, or an increase in the severity of the rapes.[616] Recall the case

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[612] Kottler, "Wives' Subjective Definitions," 232-38.

[613] Cauce et al., "Cultural and Contextual Influences."; Fox et al., "Barriers to Help Seeking."

[614] This is in line with the "ecological" approach to looking at violence which "conceptualizes violence as a multifaceted phenomenon grounded in an interplay among personal, situational, and sociocultural factors." The ecological approach advocates for a "multidimensional approach" in looking at the causes of violence as well as women's responses to it. Heise, "Violence against Women," 263-64.

[615] Liang et al., "A Theoretical Framework," 74.

[616] Kottler, "Wives' Subjective Definitions," 227.

of the 55-year old woman who arrived at the Thuthuzela Care Centre (TCC) riddled with pain and struggling to walk (Interviewee 4). While at a cognitive level she did not distinguish that her husband sexually violating her with a broom constituted rape and abuse, the damage wreaked upon her body caused her to reach a breaking point. There is also the client who came to the court on a Monday after realising the extent of the damage to her hand caused by the brutal rapes she experienced over the weekend. The Mosaic counsellor said that as she spoke with the woman and delved into her marriage history, the woman divulged that this was not the first time such a brutal beating and rape had taken place (Interviewee 6). The counsellor said to me, "so I had to go into the relationship over the years. So she said this has been his behaviour. The things that he did on that specific day to her made her to get over that edge."

7.3 Finding a Safe Space: Counselling, Treatment and Support

It is vital that a survivor feel safe before she can begin to trust the institutions from which she is seeking help, and slowly open up about her life. Various forms of counselling are offered by both organisations and form a foundational component of the resources they offer. Some staff conduct "containment" or "trauma" counselling. Over numerous sessions they listen to the clients, put them at ease, and start to build a relationship of trust. The counsellors used similar language about how they see their roles and how their main concern is to help the client to heal and feel stronger (Interviewees 1-5, 8,9).

The counselling allows women to tell their stories at their own pace and utter things that they may not have spoken of before. This is a critical component of marital rape survivors' healing journeys; unburdening oneself in a safe space. The counsellors described this process of listening, affirming the clients, and encouraging them to speak: "I listen to the story"; "We are letting them to speak their feelings, their emotions"; "They open up. They open up"; "We give them the trust, so that they trust me that they can share whatever to me"; "You don't have to be afraid when I'm here" (Interviewees 3, 8, 9). What emanates from the staff's words is the importance of non-judgment, patience and trust for survivors. Without these factors, marital rape survivors risk remaining stuck in

their circumstances and feeling more isolated, as Bergen's study of certain social services organisations in the United States elucidated.[617]

In addition to these forms of counselling, which are "a sort of something healing the soul" as one social auxiliary worker from Masimanyane put it, the staff provide pragmatic forms of guidance (Interviewee 9). The ones who are based at the police stations and courts are experts in the court and criminal procedures and take the clients through each step. This involves assisting in filing criminal charges, filling out the paperwork for a protection order, preparing the client for the interim and final protection order hearings, and making referrals for legal advice. Where clients are afraid to go to court, the counsellors go with them to provide moral support.

On substantive legal matters, at some locations clients are referred to lawyers at the courts or in the area. In this way, certain misconceptions about (lack of) legal remedies are clarified, the implications of divorce being one of them. A Mosaic interviewee relayed the following: "There are lawyers that are working here, so we transfer them… so that they explain better, in the terms of the law, what will happen, what is needed, so a person will come and be clear now, no I can divorce this one, it's not like what I heard from other people." (Interviewee 3). Regularly survivors believe that if they divorce their husbands they will lose all the assets and be left destitute, consequently accurate legal advice is indispensable.

The TCC staff perform sensitive and consequential functions as "first-responders" (Interviewees 4, 5).[618] Some rape victims go to the police station and then are brought to

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[617] Bergen, *Wife Rape*. Bergen found that certain NPOs had highly problematic and detrimental approaches to 'assisting' marital rape survivors, which led to further alienation, humiliation and feelings of insecurity amongst the clients.

[618] The TCCs are one-stop service facilities for survivors of sexual violence, overseen by the National Prosecution Authority's Sexual Offences and Community Affairs (SOCA) unit, and were created to improve victims' experiences within the criminal justice system, and to ensure a more efficient handling of sexual offences crimes. At TCC's, the victims can receive a range of services such as emergency medical

the TCC; others come to the TCC first and then are taken to the police after the counselling session and medical examination have been performed. One of the TCC Mosaic counsellors detailed the procedures that take place at the site she staffs (Interviewee 4). She serves as an intermediary between the survivor, the doctor and any detective handling the case.

At the TCC the client must go through a series of processes. A hospital clerk opens a medical file so that a record of the client is placed in the system. This is followed by "observation" during which the nurse records their blood pressure, weight, etc. and also administers an HIV test. Before the survivor sees a doctor, the Mosaic counsellor does trauma counselling, and communicates with the South African Police Service (SAPS) as needed. For the trauma counselling, she puts the client at ease, assures her of her safety at the Centre and interviews her about the violence. This information is gathered in advance of the doctor's examination given that when the victims arrive in a state of immense shock and trauma they are sometimes unable to talk about what happened. By the time the examination is conducted, the counsellor can report to the doctor what the client experienced. Before this, the counsellor would have put the client's medical file in a designated place and notified the doctor of the need for a medico-legal exam.

For privacy and security, the victim does not wait for the doctor with other patients in the hospital waiting room, but is taken back to the TCC to wait with the counsellor, and that is where the doctor conducts the examination. Where the doctor is a male, at times he requests that the Mosaic counsellor be present throughout the procedure. As part of the forensic rape kit, the doctor completes the J-88 form.[619] The detective that the counsellor has contacted signs for the kit, and then accompanies the victim to the station to file her case or continue with the filing if it has been commenced already. The information obtained at the TCC and on the J-88 captures what happened to the victim,

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care, HIV Post-exposure prophylaxis, and counselling. NPOs like Mosaic and Masimanyane are typically contracted to provide the counselling service, and other forms of support to survivors.

[619] The medico-legal examination report that must be completed by a health practitioner as part of evidence gathering for the prosecution of the case.

how they were injured, and their physical and mental condition. It is vital component of the state's evidence for prosecuting the rape.

All counsellors, whether at the TCC or the court or police station, follow up with their clients. For instance, after the critically injured 55-year old woman came to the TCC over the weekend, the counsellor said that on the Monday her job was to call the police station to find out if she opened a case and whether there was a case number (Interviewee 4). She then calls the victim to ask her how she is, whether she still needs counselling, and whether she and her husband have reconciled. If a client's well-being is in immediate danger sometimes the NPOs send her directly to a place of safety.[620]

The counselling continues prior to, post, and during any legal remedies sought by the clients. The counsellors make themselves available based on the survivor's preferences. One session is usually not sufficient to "reach" the client as the survivors need time to process their trauma: "They come to see me, they talk about their experiences, they talk about their feelings, and how they wish to grow beyond their, but sometimes if a lady sits with you and she's in tears, and you talk to her, it seems to me, that my words don't go in, because the hurt blocks it out. Yes, that is why we have to see the client more than once" (Interviewee 2). It is subsequent to the preliminary meeting that the full details of the abuse can be drawn out. Apart from where it is physically apparent, the marital rape accounts continue to remain hidden. Certain tools, perceptiveness and language on the part of community workers are necessary for unearthing and naming the sexual abuse.

7.4 Education and Bringing the Sexual Abuse to Surface

The findings presented in this dissertation, in conjunction with a significant body of literature on rape, affirm that the concept of rape ensconced in the law is different to the perceptions that stubbornly hold fast in quotidian spaces. There was a time when codified law was not progressive, and narrowly prescribed the criminal law parameters of rape. As

[620] Masimanyane currently has its own shelter.

I described in previous chapters, the androcentric philosophies that imbued the law grew out of social spaces. While codified law has moved ahead, those age-old standards that privilege men are very much alive. I have demonstrated in Chapter 6 how women are trained to endure violence in marriage. Accordingly, community educators and counsellors invest resources and time in educating clients and communities so that they understand what rape is, and are able to apply this learning to demand more from their marriages than they have in the past, or to make the decision to leave if they determine that is best. The purpose of this education is not to impose a universal truth on clients, but to give them various tools for making sense of their experiences. This allows them room to self-define and to evolve as they choose. It opens up new avenues of perceiving.

The informants for the study described the process of educating and counselling over time as an awakening of sorts, an opening up of the mind to see life anew (Interviewees 1, 3, 8, 9). Preceding this awakening it is extremely difficult for clients to understand how "rape" and the "sex" that their husbands coerce them into are one in the same, and that the force constitutes an act that violates their personhood, and is also criminal. Counselling also reorients the survivors to see that the problem for which they initially sought help – the presenting problem – is not the foundational problem. As the counsellors "unpack" the categories, the clients are able to define what was happening to them, and how the husband's behaviour fits into the abuse framework.

To ensure that clients are informed about all forms of abuse the counsellors talk about each discrete category, sometimes using posters on the wall and pointing to the various types of harm (Interviewee 3). They highlight physical, economic, mental, psychological and sexual abuse. As I discussed in the preceding chapter, some women speak of sexual abuse in passing, and so this presents an opportunity for the counsellors to educate. A counsellor from Mosaic went through the education method and how she had applied it for a client who had come in the previous week. The client was in a highly abusive marriage that was also characterised by a range of cruelties. Her husband was having an affair with one of his male friends, as well as sleeping with young boys. He also physically, sexually and financially abused his wife. The counsellor recalled the steps she walked through with the client: "As you entered here, the board that highlighted all these

types of abuse, we pointed to that board and you will see, these are the types of abuse, and she could pick one of them that are happening to her" (Interviewee 3).

Accounts such as this one exhibit the significance of naming abuse as part of recourse seeking. Regarding the same client, the counsellor further relayed: "This lady couldn't even know the name domestic violence. It was her first time. And then, whatever the husband was doing to her, she thought it's okay." Spending time talking about each form of abuse aided the client in finding a name for what she was subjected to: "Now while we're unpacking all the things, she could define, oh this is what was happening to me, oh this was a domestic violence, these are the sexual abuse, this was the emotional abuse, oh this was psychological abuse" (Interviewee 3).

To further extract what is taking place in a client's life – where for example the client has not highlighted any instances of sexual abuse – the counsellor will ask questions that are carefully designed to elicit the information (Interviewees 1,2, 6, 8, 9). As part of this process, the informants repeatedly told me that they tend to refrain from using the word "rape" in the early stages (Interviewees 1, 2). The word can be jarring and invasive to a survivor. Moreover, it is unhelpful where the survivor does not yet identify forced sex as rape. One staff member expounded: "Normally you first have to ask the question: All this kind of abuse is taking place so when you have a fight and he want to have sex with you and you refuse, what is his behaviour then, then they will come out" (Interviewee 6).

Connecting to one's feelings, one's inner sense of right and wrong, and one's desires is part of the counselling process. Once the survivors have spoken of what has been happening, this prompts counsellors to follow up with questions such as "how do you feel?", "do you think this is a right thing to happen to you?", and "do you think this is a right partner?" (Interviewees 3, 9). Having been indoctrinated according to patriarchal norms, self-reflection and self-recognition are a revelatory outcomes of counselling.

In contrast to individual counselling, in community settings there is the opportunity to raise the subject of marital rape more directly. Masimanyane is emphatic about their workshops and they travel far and wide in the Eastern Cape in order to reach

new communities of women who can then in turn train other women about their rights. In their workshops they specifically cover the subject of marital rape, making the distinction between consensual and non-consensual sex (Interviewees 8-10). Notably in the rural areas, this lesson generates significant confusion as women are taught that sex takes place on the husband's terms and is an irrevocable part of marriage. The community workshops also allow both organisations to identify clients, as the lessons stimulate awareness.

Further, community advocacy has made a mark in some areas where *ukuthwala* is practiced (Interviewees 13-16). Both the survivors that I interviewed, in addition to the *ukuthwala* project staff commented that because of cases in the media, a spreading of democratic and human rights ideals, and local education about *ukuthwala*, in some locales girls are more inclined to not stay in such marriages and men are increasingly reluctant to follow practice in its brutal form.

7.5 Preparation, Empowerment and Decision-making

For survivors, there are other developments that take place in conjunction with their new awareness. Some progress is pragmatic, safety planning for example, and others are less tangible but are monumental. These significant sequences flow from a cognitive shift in the survivor, the result of counselling and contemplation. The client becomes more independent, self-assured and decisive. Such milestones are in fact all the more salient and lasting for they arise out of renewed strength, confidence and knowing.

7.5.1 Safety Planning

Immediately, safety for the survivor and her children is paramount. It is necessary for her to determine how to remain as safe as possible while remaining with her husband in the home, or after having left the home. Accordingly, safety or contingency planning is a facet of the counselling provided by the organisations. With the appreciation that survivors cannot totally rely upon legal remedies to protect them even when the remedies have been put in place, they must begin to proactively think and act. Victims of domestic violence and abuse are experts in their partners' behaviour. They are familiar with what

triggers the abuse and what trajectories the assaults follow. The counsellors encourage the survivors to use this expert knowledge to try to diffuse the abuse or to determine when to escape if the danger escalates to a critical point (Interviewee 2).

If remaining in the home, it is imperative for the survivor to keep important official documents together, and one's keys and money if possible, so that if she must flee quickly with her children she is in possession of essential items. For the cycle of abuse, the act of leaving can give rise to the greatest harm. Feeling a loss of control, it is the point at which perpetrators decide to violently retaliate, including by raping, or killing their victims. The counsellors advise their clients to act calmly and surreptitiously when having to leave, and to be prepared in advance with their belongings. This also ensures more safety for the children as the husband may try to grab/hold them hostage should the survivor inform him that she is leaving (Interviewee 2).

The act of obtaining a restraining order also provokes some abusers to lash out, and so contingency planning comes into play while the survivor is engaged with the law. A counsellor based at one of the courts where Mosaic has a presence described her recommendations to clients: "…when you're coming here to do protection order you must have plan B, knowing that I'm not going there, when he receives this, he will go mad, so I must be away from him up until this thing settles" (Interviewee 3). Thus for the duration of survivor's help-seeking, irrespective of whether it entails legal remedies, she must remain consistently vigilant and learn to be one step ahead of her abuser. Without such vigilance and preparedness, her life and her children's well-being are at stake.

7.5.2 The Markers of Empowerment

The counsellors stressed that empowerment of clients is the essence of their work, and in fact represents a highpoint in the course of their relationships with survivors (Interviewees 3, 5, 8, 9). Empowerment refers to a state of believing that one has the right to determine the course of one's life, and can consequently make decisions to bring wants and hopes to fruition. Empowerment is fundamentally the outcome of time, a period over which the survivor undergoes counselling, and looks at her marriage more critically. The

relief that comes from empowerment not only presents in a survivor's bolder and more confident behaviour but also in physical transformation.

There are markers which evidence the client's transition to empowerment. The display of assertiveness and the intention to stand on one's own feet are positive signs (Interviewees 3, 8, 9). A client's ability to shed old conceptions and affirm that she does not deserve maltreatment in her marriage, are telling signals of her progress. "Up until you get empowerment, they would see now, no, this was wrong, this was happening to me," one of the informants conveyed (Interviewee 3). A veteran counsellor from Masimanyane submitted similar views: "Our mission is to empower the women more than of assisting them; empower the women to be able to assist themselves, to be able to take their decision with a clear mind knowing all those things, knowing straight away what is sexual assault, what is physical abuse, what is financial abuse, all those forms of abuse" (Interviewee 8).

Exuding elation, the counsellors remembered encounters with present and former clients who had physically transformed or shown vast improvement in their lives stemming from the counselling they had received (Interviewees 1-2, 4, 6, 8, 9). The Mosaic TCC counsellor who walked me through the routines at her location said that when she goes to the shelters months later to visit clients that she has assisted, sometimes she does not recognise them. Smiling she said, "I don't even know them, as beautiful as they look… from the day they was coming there to the Thuthuzela, out of an abusive relationship or marriage, they was like… they pretty" (Interviewee 4). The references to outward appearances are not reductive or superficial, for the counsellors are not advocating for a precise form of beauty nor emphasis on appearance. The impressions of clients' transformations are instead a representation of how abuse inscribes pain on the bodies and psyches of victims. The relief from suffering materialises physically, as well as psychologically.

The counsellors also witness their clients' progress through chance encounters. As the staff live near or within the communities that they work in, they meet their clients

while walking in the streets or running errands.[621] This is where they see the long-term impact of the counselling sessions. Referring to clients who remained in their marriages but underwent counselling about how to be more assertive, a Mosaic counsellor announced: "Some of them say thank you, and some, you know we all live in the same area, so now sometimes they would say, 'it worked you know!'" (Interviewee 2). A survivor need not always leave a marriage. An improvement in the relationship too counts as a success.

7.5.3 Decision-making

Resolute and deliberate decisiveness grows alongside and out of empowerment. Survivors make decisions along their journeys but the nature and motivations for such decisions are different. Before empowerment the choices that survivors make are preponderantly reactive and not proactive. Initial decisions stem from the survivor's urgent need and desire to be safe, or are connected to the presenting problem as opposed to the underlying problem (Interviewees 6, 7). There are clients who do come to the institutions with self-assurance and clarity about the courses they would like to take. However, as the data on barriers evidences, marital rape survivors generally arrive at the organisations weighed down by the psychic and structural chains of gender inequality.

The goal then, of counsellors, is for their clients to ultimately take decisions rooted in strength (Interviewees 3, 8, 9). This may take months or even years, with changes of mind along the way. As the philosophy of both organisations is to refrain from pushing any specified agenda for the client, the staff prefer to lay out recourse options and then allow the survivor time to think and arrive at a decision when they are ready. At that point, the counsellor assists in the implementation of the chosen course of action.

The counsellors also appreciate that for the survivor leaving the marriage is not always feasible or desirable; but where the client decides to divorce her husband, this is

[621] For privacy purposes, not all of the counsellors acknowledge their clients in public. They instruct their clients to not reveal that they are acquainted since the community and the abuser may then learn of the fact that she is seeking help.

celebrated since leaving an abusive relationship demands immense courage and will (Interviewee 8, 9). It generates confusion and worry about what people will think, how the children will be supported, and how they will live without the materials things and standard of living made possible by the husband. A police station-based counsellor from Masimanyane stated: "I feel very happy when a woman comes into decisions that I want to do this now. I'm strong. Because you see that, you are taking an extra mile to know that you are in an abusive relationship, and it's very hard to pull out. It's very hard" (Interviewee 9).

To illustrate how decision-making comes about through empowerment, I include two quotes from counsellors, for their own words most vividly communicate the victory of clients' decision-making:

> …maybe after some few months, you will hear that client call you, "Hello Sisi, how are you, fine and fine and you? How did…", then I will ask as a counsellor, "How do you feel now after that…," "Yhu, I feel great, I feel… I wanted to see you because I made up my mind, I need to apply for the divorce, or I need to apply for the protection order. I've take the decision. I've take the decision" (Interviewee 9).

> You know, so you will see those steps, steps and steps, and it's the same applies with the maintenance. You will talk to the woman, talk to the woman, then she will phone, "Sisi, I made my mind, this man has to support my children". So you will see there, where is your work following… otherwise you can't see the change on the first day or in two sessions you will be able to see the change, you know (Interviewee 8).

The factor of the passage of time resonates across the informants' utterances. The survivors do not travel along a straight road, but one that meanders and marked by peaks and lows. Yet, in due course, they can and do find their way to more stable ground.

7.6 Criminal Justice and Civil Legal Remedies

The social and cultural embeddedness of marital rape points to the fact that law-oriented, cookie-cutter remedies are ill suited to situations of intimate partner violence. Shortly after the enactment of the Prevention of Family Violence Act (PFVA), feminist

legal scholar Fedler wrote that the "strange alchemy of violence within intimacy lends domestic abuse a unique quality as a legal problem, for there are no stark realities, no one-dimensional solutions."[622] If properly applied, the comprehensive and victim-centred laws enacted after the PFVA do have the potential to increase survivors' chances of legal justice through legal remedies, but most victims do not utilise the law. The pressures of retaliatory abuse by the husband, family and social control, and financial dependence, are strong deterrents.

In spite of the plethora of challenges laid out in the previous chapter, women are able to find justice through the courts and the police. At times, this is because a detective, or police station is already inclined to helping victims of violence. Notwithstanding the efficiencies of some SAPS locations, the data collected from the interviews indicates that not infrequently state authorities are pushed to act or guided by the NPOs situated on their premises or whose offices are based in the locale (Interviewees 1, 3, 4, 8, 9). On that account, the positive functioning of state authorities is correlated with NPO resources, expertise and activism. In some environments, the relationships between authorities and NPOs were, or continue to be characterised by antagonism, for the NPOs hold the police and courts to account for their failings.

Nevertheless, a veteran counsellor at Masimanyane noted that over the years the relationships at specific locations have improved considerably (Interviewee 8). Also, the authorities appreciate the work of the NPOs as it helps their sites to run smoother, and helps survivors to be better informed and prepared for navigating their cases. In the Eastern Cape, an informant reported that "many" courts want Masimanyane to be part of their Victim Empowerment Programmes, but Masimanyane does not have the capacity to do so (Informant 8).

I will now look at the beneficial impact of two legal remedies: protection orders, and arrests in conjunction with rape charges and violation of protection orders. The protection order can act as a short-term emergency remedy. In instances where the client arrives just

[622] Fedler, "Lawyering Domestic Violence," 231.

having been assaulted, certain counsellors stated that they immediately recommend a protection order. Once that is in place, they begin the counselling process. The staff of both organisations spoke to the benefits of protection orders, affirming that they actually do work (Interviewees 3, 4, 6, 7, 9). Some husbands stop the abuse after receiving the order. Clients reported that there was a discernible difference in their relationships because of the protection order.

Returning to the Mosaic client who came to the court for help on a Monday, her case exemplifies the positive shifts that protection orders can bring about. After the sadistic rapes by her husband (he had beaten her with a broomstick and then raped her from midnight until 5 am) and the gravity of her injuries, she did not file criminal charges. The Mosaic counsellor remarked that the client only wanted a protection order despite the many options the counsellor laid out for her. A few years later, the counsellor recollected, "I met her again and I didn't even recognise her. And she came to me and she said, 'can you remember me?'" The former client spoke of her relationship with her husband, saying "We're so good now together. Our life is wonderful, you won't believe. It was a good thing for me to come to court to look for help" (Interviewee 6).

It is noteworthy that a civil remedy, as opposed to a criminal one can reap such profound and lasting change, especially in a marriage characterised by substantial levels of abuse. At the same time, this client's outcome encapsulates another point, which is that criminal remedies are not necessarily preferred. Survivors may want a remedy that results in as little disruption as possible in their marriage.

A counsellor at Masimanyane voiced her views on survivors staying in their marriages: "Sometimes you're not supposed to go out of the marriage, but know your rights while you're inside. Sometimes you have to draw the line, saying that, this… is been years happen to me. My husband, you can't do this again to me" (Interviewee 8). The Mosaic client made a conscious decision to send a firm message to her husband by obtaining a restraining order, but also resolved to stay in the marriage. Others do leave after getting the order. One court counsellor stated that some of their clients feel so powerful after getting the order they separate from their partners out of a fear of returning

to the trauma (Interviewee 7). Empowerment means that clients have the ability to make choices for themselves, and while there are certain patterns of behaviour, each survivor's path is unique.

Another commanding feature of protection orders is the risk of arrest of the perpetrator if the order is violated. The threat of arrest deters some husbands from committing further abuse. The perpetrators who hold disdain for the law receive increasingly harsher punishments each time they violate the order. The first violation results in a short period of imprisonment, a day or a weekend. Subsequent jail terms go up to a week or two weeks. The prison term can go up to five years. Taking stock of how the law puts unruly perpetrators in their place, a Masimanyane counsellor based in a Victim Empowerment Centre commented, "… but you see that abusers becoming scared, they are arrested not for the first time, they think that it's a joke, they repeat it but they stop, they see that now, because it's not nice inside the jail, because others are coming out being sodomised" (Interviewee 9).

7.7 Conclusion

This chapter has documented some recourse forms and outcomes that bring both short-term and enduring relief for survivors of marital rape. Within an ecological framework, the research presents a multi-textured depiction of what recourse, relief and justice mean and look like from non-law-centric perspectives. Each form of recourse draws the existence of the sexual violence from darkness and into full view, reshaping the rape from a state of invisibility to that of visibility. During my fieldwork, there were cases for which it was too early to tell which direction the survivor's life would take, but overall, the trajectories described by informants confirm the critical role of the NPOs and effective partnerships with law enforcement.

I bring the chapter to a close by revisiting the case of the TCC client whose unspeakable agony (being repeatedly raped by a broom) remained prominent in the mind of the counsellor after her weekend shift (Interviewee 4). The detective who brought the client to the TCC and the Mosaic counsellor worked together to provide the best care for

the woman. After the medical examination was complete, the counsellor advised the detective to take the client home so that she could bathe and rest. She then instructed him to bring her back to the TCC on Sunday to collect her prescribed medication, which the counsellor would have ready. She continued to direct the detective, recommending that only after these steps should the detective take the client to make a statement and open a case, and lastly, arrest the husband. "He did it like that," she said.

On Sunday, the police arrested the husband, and the detective brought the client back to the TCC. "And then I was there," the counsellor said to me, and continued "she was looking nice, she was clean, she was washed, but because... and I feel so painful to her when I see her, but then I was looking… she was smiling, she was giving me even a hug… a lot, she hugged me a lot." The client said to the counsellor, "if it wasn't for you I would have maybe died. But thank the Lord for you."

8 Chapter 8: The Life Histories of Two *Ukuthwala* Survivors

8.1 Introduction

The previous two chapters provide insights into survivors' lives; events and feelings that they recounted to the NPO counsellors, and personal change that the counsellors walked survivors through. Through the framework of (in)visibility, I first looked at the interlocking local forces that impede emancipation from abuse, and subsequently juxtaposed these impediments with the kinds of relief and assistance that effect emotional and physical healing, and increased security for survivors. These themes emanate from the present, from the era of democracy. In the present-day South Africa, a robust civil society indefatigably calls attention to the many ways in which the notions of democracy, human rights, equality, and liberation still remain abstract concepts for the majority of South Africans, for they still live under precarious and desperate circumstances.

Women's lives are at risk because of the thoroughly gendered manifestations of inequality in which they are submerged. This is not a feature of the present alone, but has deep and long roots in the pre-democratic period. We do not know enough about violence against women in the past because academic texts and public memory exclude, gloss over, and camouflage women's frames of reference. The *ukuthwala* crusade that I detailed in Chapter 5 clarifies the dangers of romanticising Black culture and selectively listening to communities. The recent dominant literature on *ukuthwala* and rape avoids the past, except to make the argument that culture assured protection for women and designated rape in marriage rituals as an anathema.

In this chapter I present the life histories of two *ukuthwala* survivors, Asanda[623] and Anele[624] (Interviewees 13 and 14). I include their stories in order to counter selective

[623] This is not the survivor's real name. I have created a pseudonym to protect her identity.

[624] As with the other survivor, this name is a pseudonym which I use for confidentiality purposes.

portrayals of *ukuthwala* and rape in marriage. Further, the insights of the survivors present a long view of how women navigate abuse in their marriages across different spaces and time. During my visit to Masimanyane in East London, I conducted a group interview with two veteran staff members (Interviewees 11 and 12) and the two *ukuthwala* survivors who are Masimanyane clients. They had travelled to East London that morning from a rural area of the former Transkei in order to meet with me. The staff translated as each woman spoke, and provided contextual information based on their ongoing work with these survivors, and other women in rural communities.

Asanda was about 60 years old at the time of the interview, and Anele was in her late 50s. They had both been *thwelwe* in their teens. I lay out each life history as the survivor told it. Many of the (in)visibilising factors that I documented in chapters 6 and 7 are woven throughout their testimonies. Yet because the survivors are older, we also travel through successive eras, from a time when children's/girl's rights received no consideration, to contemporary times in which a consciousness of equality is slowly – albeit unevenly – taking root across South Africa. Moreover, from a historical standpoint, the survivors' voices expose the longstanding acceptance and practice of culturally sanctioned rape in marriage within the communities in which they grew up in the former Transkei. They were only able to begin to find healing in their mature years once they came into contact with Masimanyane. Asanda and Anele are in quite different stages in their journeys. As we spoke, Asanda displayed acute pain and trauma from the events of her youth. Anele, who had worked with Masimanyane over a longer period and had told her story many times in different platforms, displayed more confidence and self-assurance.

8.2 Asanda's Story

Asanda got married in 1974 when she was 16 years of age. She was abducted on her way from school. It was in November while she was writing end-of-year tests. She was in Standard 5 (Grade 7). Her father forced her into a marriage that he had arranged. One day her father instructed her to go to her future husband's home, but she did not want to, and so her father and two boys dragged her there. Her prospective husband had never seen her before, nor had she seen him. It was his elders who had chosen her for him.

During the abduction process, Asanda wept. She was afraid of her father, and felt helpless to change her circumstances. If she fled the marriage, what would she go back to? At the time they did not have children's rights. If she went home her father would chase her away. And so she remained with a husband that she did not know.

Her husband was born in 1948. He was too old because she was the same age as his younger sibling who was the third one from his birth. With force from both sets of parents, she remained in her husband's homestead. She was 15 years of age and did not know anything about sex. She was a virgin and did not want to sleep with her husband. One night he forced himself on her when she was refusing to sleep with him. There was blood as she was a virgin. She went home and told her family that she could not sleep with her husband but they refused to welcome her back and told her to persevere. The marriage was physically and sexually abusive. He continued to rape her because in the rural areas her husband knew that she would not go anywhere to report him. He would force her to have sex even if she protested. Over the course of the marriage she had seven children.

Early in the marriage, her husband moved to Gauteng to work in the mines, but he did not send money back home to provide for Asanda and the children. She had to rely on his parents, who came to be a great source of physical and emotional support for Asanda. His parents loved her. She would report to them when her husband hit her. She never told her own parents how her husband mistreated her. After her husband's parents died Asanda had no choice but to relocate to Gauteng to demand that the husband support her and their two children. By then he had been in Gauteng for about four years.

In Gauteng, Asanda's husband still refused to maintain her and the children, and continued to abuse her. He was a drunk and a gambler. Asanda struggled to find employment as a domestic worker because she could not speak English. She would struggle to hear instructions from her employer. Eventually she made money by selling apples on the street in the Johannesburg suburb of Alberton where they lived. Asanda made use of the authorities in Johannesburg to improve her circumstances. She went to the child support authorities so that her husband would be compelled to pay the child support grant. She also began to report him to the police for abuse.

Asanda's husband stopped beating her out of fear of being arrested in Johannesburg, where it was easy for Asanda to go to the police. He only beat her when they were in the rural areas. In Johannesburg the police were always present.

It was because of the children that Asanda persevered in the marriage. She did want to divorce her husband earlier in the marriage but her children asked her not to leave. She decided that it was best that she stay with her children. She had five girls and two boys, but one of her daughters passed away the year before. Only one of her children, a daughter, is now married. The others are too scared to as they are traumatised by what they saw their mother go through. They say they do not want to be abused in their marriages.

Asanda is still with her husband. She has long forgiven him because she is a religious woman and committed to her church. She prays a lot. Her husband is much better now – the result of becoming a churchgoer. He does not like talking about the past, about the way he used to abuse Asanda. He says these things stress him a lot. When she tries to mention the past abuse to him, he does not allow her to finish. He does feel remorse for what he did but he keeps quiet when she speaks of his actions.

She is trying to let it pass, the things of the past, but it is difficult for the pain to end. Her blood pressure is continuously high. Her father passed away and she still blames him for what he did. Her life turned into this because of him. He didn't want her to get an education. *Ukuthwala* was the norm during her youth. It does still happen but now girls are reporting it to the police. Recently a man abducted a girl but the police intervened and now others in the community are afraid to get involved with *ukuthwala*. During her girlhood, although there were police around they would not intervene in cases of abduction or domestic abuse. This is why reporting to police was not an option for her and other girls. Sometimes they would even think of hanging themselves because not even their own parents were willing to help them out.

8.3 ANELE'S STORY

Anele was *thwele* at age 14. Her mother was also married through *ukuthwala*. Her husband, Anele's father, was a drunkard who would drink all the time and only bring home R10 for the family. He beat her mother badly. Eventually Anele's mother left the marriage with her two children. While looking for a job, Anele's mother left her and her sibling with other women. Once she had found a stable home, job and had also gotten married, she brought the children back. That was when Anele was *thwelwe*.

In the new marriage, Anele's mother met Anele's future sister-in-law, whose family lived nearby. Together they arranged for Anele to be married. Anele believes that her mother thought it better for her to go and start her own family since she was not the child of the mother's new husband. If she remained, she would not belong, even with her maternal family. Since Anele's own mother was married through *ukuthwala* she likely thought it right to continue the tradition.

Anele was in standard four when the abduction took place. It was late in the evening and she was cleaning her feet to sleep and go to school in the morning. While she was bathing in the *waskom* (silver wash tub) the men arrived. One man grabbed her and raised her legs high in the air for the other men to grab them. Anele was never involved in the marriage negotiations nor informed about the impending abduction. She was defenceless as the men travelled with her to their destination. It was dark and they walked through the bushes. She was covered with a blanket so that others would not recognise her from her screams.

Anele tried to come up with tricks to escape. She asked for them to release her so that she could go and urinate. She began to run but then she fell. They caught her and beat her. During the abduction the men did not tell Anele who they were nor where they were taking her. At the destination she was put into the room of her husband, and this is how she discovered who her husband was. He had been there during the abduction but did not sympathise while she was crying and being beaten along the journey.

As a newly abducted *makoti*, she was not allowed to leave that room for a week. On the first night, people stood listening outside the room while her husband raped her. Following the act, her husband took a bloodstained cloth to prove her virginity to the elders. Those waiting outside had heard her screams. She was crying since she was a virgin. Yet, she could not fight him for being exhausted from the running and beatings during the journey. Her husband raised her legs high to his chest to ensure that she was defenceless when she tried to fight the pain of his penetrating her. He did not let go of her legs until he penetrated her.

The husband had to make sure that he took Anele's virginity and that she bled. These acts of violence ensured that Anele remained with him. They also assured that she physically could not run away as it was difficult for her to walk for about a week. She could have attempted an escape after that week, while fetching water at the river, but the thought of being mocked and isolated back home discouraged her from leaving. She was no longer a girl yet also not a mother. If she went back home she would not even be allowed to attend ceremonies, nor could she attend school.

After her arrival, her in-laws set a timeframe for her to become pregnant. She was subjected to immense pressure. Her first child died during birth. Being so young, the pain was too great and she could not push during the birthing. Her body was immature. This led to the death of the child. Luckily, Anele and her mother-in-law had a good relationship. Anele would take her to see her daughter when she was sick. One time, after Anele had dropped her mother-in-law off at the daughter's home, Anele decided to go and see her uncle. Upon returning she discovered that her mother-in-law had died. Her husband's family accused her of killing the mother. The accusations and bad-mouthing added to Anele's pain of being abducted. She decided to leave.

While away from her husband's homestead, his family found another woman to marry him and take her place. The new wife also left him, at which point the in-laws called Anele back. She returned since she had a child with him by then. Her husband began to have affairs in Johannesburg and fathered children outside of the marriage. On the third encounter, Anele left him and did not come back for eight years. During that time her

husband married another woman with whom he had two children. Anele only returned because she was afraid of what would happen to her own children whom she had left behind. She had learned that the wife was abusing her children, and that her son had started taking drugs. Anele's husband negotiated with her mother for Anele to return. On her arrival at the husband's homestead she declared that she was there for the children only. The children eventually began to feel more secure since Anele was there and the other wife left.

Anele stayed in her marriage. She has five children. She says she and her husband survived the marriage through perseverance. He is remorseful for how he abused her. What has helped her is the continuous talking about what happened to her with the help of Masimanyane. She has travelled to different places to talk about her experiences, including before government bodies. Talking has helped her healing and she can now speak openly about what happened in the past. If she had not encountered Masimanyane she does not know how she would have handled the emotions that she was keeping to herself. The trainings she attended helped her to not hold onto the past, but to deal with it so that she could proceed with her life.

Anele has grown stronger and has been pivotal in dealing with family matters. Though she has little money, she is the financial provider for the family as her husband does not work. In addition to her government grant she developed projects to bring in income and to uplift women in her community. Anele organised for women in the area to help each other plough, and also create a money rotation system so that everyone is more financially secure. *Ukuthwala* continues to happen in other areas, especially Mthatha. She is concerned about *ukuthwala* in modern times, the struggles of young girls, and the *ukuthwala* wounds that [older] women are still carrying.

8.4 Reflections

As we all spoke and supported the survivors during the group interview, the Masimanyane staff shared their insights with me. They spoke about violence in marriage and the influence of culture, and how women who were *thwelwe* are living with the pain of

unhealed wounds. Critical of the lack of intervention by society at large, one counsellor rhetorically asked: "And the society, what actually the correction that they are doing to the women who are still in those wounds?" (Interviewee 11). Asanda cried during her telling of her story, and we took breaks to let her breathe and to console her. One of the counsellors rubbed her back. "It's a lot of pain! It's a lot of pain!" the counsellors declared (Interviewees 11, 12). It is pain that the survivors feel when they speak of their past, it comes to the surface, "it doesn't end." For Black rural women, marriage is, as one of the counsellors said, "a very difficult journey" (Interviewee 12).

The Masimanyane community workers informed me that when they started working with Anele, she was just like Asanda was that day. "Can you see," the counsellor said, referring to Anele's composure, "when she's telling the story, she's stronger because... it's not the first time, she's always telling lots of interviews" (Interviewee 11). She continued: "On first and second interview she was crying! She was crying! Crying!... now she is stronger because she's always having these interviews, always talking about this, and it's *healing* in a way." This is not to say that the absence of tears necessarily means that someone is stronger. The Masimanyane staff do not encourage the survivors to hide their feelings or to put on a mask of resilience. But, they have seen Anele grow from feeling helpless and disempowered in her marriage, home and community, to making peace with the past, becoming financially independent and taking up a position of leadership in her community.

Paralleling the social barrier motif of Chapter 6, the counsellors emphasised the fact that [Black] women, "they learn. They learn to stay in their marriages" (Interviewee 12). Even if the marriage is very broken, they learn to stay. This is what they have been taught. What makes spaces such as the ones provided by Masimanyane so vital is that they give women the safety to simply be, to cry, to bare their wounds and vulnerabilities. So often, Black womanhood is ascribed the characteristics of strength, endurance and perseverance.[625] The language of the *Mvamvu* judgment regurgitates the stereotype that

[625] Phililе Ntuli, "Defending Shabangu: On the Strengh/Ening and Weakness/Ing of Black Women," *The Centre for Law and Society Blogspot*, 26 June 2017,

Black women are not feeling beings; they can withstand unspeakable abuse and yet feel minimal pain or none at all.

The *ukuthwala* script suppresses the voices of older Black women, as though violent *ukuthwala* and the accompanying suffering is a recent phenomenon. By masking the ravages of marital rape over generations, the *ukuthwala* discourse perpetuates the cliché of stoic and formidable *bomama*,[626] bearing up their families and communities on their indefatigable shoulders.

In an opinion piece, feminist commentator Ntuli critiqued the tenacity of harmful conceptions of Black womanhood in South African discourse. Speaking of Black mothers and grandmothers, she wrote: "We must confront the reality that we live in a society where extra-ordinary women do not speak… We measure their stature by how much they do not complain or share anguish with others. We nobilise their silent suffering and in turn recreate tropes for the present and the future about the hidden beauty of Black women."[627]

For the sake of their children, and because of alienation by their families, Anele and Asanda stayed in their marriages. It is only as a result of the trainings provided by Masimanyane that they have been able to open and unburden themselves. Although Asanda and Anele are aware that in some areas girls are now fighting for their rights, there still remains the concern about the hold of patriarchy over parts of the Eastern Cape. Not every girl can escape her marriage, and not all rural women have access to safe spaces to speak about abuse. In this way the façade of Black female fortitude is maintained.

In terms of the brutal forms of *ukuthwala* that are characterised by abduction, beating and rape, Anele and Asanda's experiences attest to the very entrenched and intimate connection between marriage and violence. Within the areas that the survivors

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https://clsblogspot.wordpress.com/2017/06/26/defending-shabangu-on-the-strengthening-and-weaknessing-of-black-women/.

[626] Mothers.

[627] Ntuli "Defending Shabangu."

grew up in, the forms of *ukuthwala* that they endured were the norm, an accepted part of forming a marital union. This is why their parents did not rescue them. Anele's testimony of her rape is striking. It demonstrates that rape in the context of marriage, and rape generally, has nothing to do with lust. It is an act of power, utility and symbolism. Complicit in the violence, an audience waited with anticipation outside the room where Anele's husband raped her. By raping her he proved her virginity and the potency of his manhood, flaunting the evidence of the bloodstained cloth. The rape also wounded Anele to prevent her from escaping, and most critically irretrievably transformed her social status so that she could not return home. The acts that her husband and both families committed upon her body reinforced the idea of women and girls as objects designed for the inscribing of male superiority and the supremacy of family.

Asanda and Anele seemed hopeful that with police intervention and increasing intolerance for *ukuthwala*, the prevalence of forced marriage will decrease. They are nonetheless aware that awareness levels and police intervention are uneven within the Eastern Cape. Anele pointed out Mthatha as an *ukuthwala* hotspot. Nonetheless, as the survivors could not rely upon police assistance in their youth, they welcome the availability of criminal justice system in contemporary times. Chapters 6 and 7 highlighted the contradictory nature of criminal justice responses. In some areas the police and courts plainly decline to get involved in cultural matters, while in others, and as the survivors' testimony affirms, the police are protecting women and girls from abuse in the home.

The narratives also document the centrality of non-legal forms of support for women. The survivors' value Masimanyane's training and counselling; resources that emphasise emotional healing and the acquiring of knowledge about rights. The interventions of Masimanyane in their rural communities sparked a trajectory of introspection and healing. Anele said that her sense of peace and independence are the outcome of the empowerment engendered by Masimanyane. Asanda is in the early stages of her journey, but for now is at least given the space to weep and to speak openly in a supportive and pro-woman environment. She will travel along her path of healing at her own pace.

The Masimanyane staff are excited about their work and advocacy work in general. Awareness raising and campaigns are helping women to know that the practices of violence and discrimination are not good. With education and more knowledge women are equipped to make better decisions for themselves and to pass these lessons onto their children. The counsellors also made the point that in this democratic society, "things now are being on the table." There are *ukuthwala* cases in the media, there is training, and more transparency. "We are all aware that rural women are still oppressed," one of the counsellors commented (Interviewee 11). Gay women are being forced to marry, and women who do not bear children are brutalised. Women "only get recognised or listened to when they are in the shadows of their husbands," she remarked and continued, "(w)e can't continue begging for men's mercy." For now, they will continue to do work according to the saying, "one mother is a help to other mothers." Yet, this also means that women are both victimised and must also do the work of liberating themselves. Men largely remain unaccountable and unscathed, and Black women have no choice but to lift each other up.

9 Chapter 9: The Journey's End

9.1 My Own Beginning

When I began the journey of conducting empirical research on marital rape, I erroneously believed that I had a good sense of what I may find. I did not know the precise substance and form of what my research would unearth, but based on my own feminist orientation and prior research on women, I held preconceptions about marital rape and how victims respond. It was only once I immersed myself in the field that I became aware of what my preconceptions actually were, and that I, in fact, was naïve in certain respects about the extent of the erasure of marital rape in localities of contemporary South Africa. The job of a researcher, I learned as I went along, is to shed what one thinks one knows. If you hold too tightly onto certainty, it precludes deep learning. You miss enriching and important phenomena; and miss the opportunity to see your research subject and environment anew.

As I commenced my interviews with counsellors, some were slightly confounded as to *why* I was focusing on marital rape and attempted to redirect the conversation to intimate partner violence broadly, and to other forms of abuse – the forms for which their clients most frequently sought assistance. Violence in intimate partner relationships and marriage have the same characteristics, one counsellor informed me, as she tried to encourage me to relinquish my concentration on marital rape. I began to doubt whether I would find anything consequential, and whether I was making a mistake by researching marital rape as a discrete issue.

Because Mosaic and Masimanyane are women's rights organisations, safe havens for victims of violence, I created a picture in my head of how victims would present and relieve themselves in these institutions. I imagined women raising the issue of marital rape right away, for I thought – again too simplistically – that because rape is such a deep violation of a persons' dignity, this would be the first and most pressing issue for survivors. "What could be more violative and violent, than rape?" I pondered.

As I persisted amidst my confusion, an epiphany emerged. A talk with my supervisor and time self-reflecting enlightened me to the fact that I had been looking at my subject in the wrong way. I had neglected to appreciate the meaning of some counsellors' befuddlement and their inclination to talk about things other than marital rape. The fact that some counsellors did not frequently encounter marital rape cases, or lumped these cases under the category of intimate partner violence or domestic violence, had meaning. Informants' detracting from the subject of marital rape, compounded by the hidden state of marital rape even within feminist sanctuaries, was a reflection of reality. Marital rape, as a counsellor at Mosaic declared to me, has been hiding. *That* reality of stubborn invisibility, I determined, was my subject.

I grew more open to the seeming absence of marital rape as I conducted my interviews, and I learned to make meaning of the silences, as well as to ask questions differently to elicit information about the issue. As I grew more perceptive and travelled to different locations, the subject became more prominent in my interviews, and informants had a considerable amount to tell. The focus of my questions became why and how the subject of marital rape is hiding, and what community factors make it hard for women to find help. Given these constraints, I also sought to ascertain how marital rape does come to the surface, and how women find relief.

9.2 What Have we Learned?

I conceived of this dissertation as being exploratory and fluid, and this is why I chose the seemingly abstract theme of (in)visibility as the foundation of my questions. Weaving the concept of (in)visibility throughout my dissertation allowed for me to create a story of texture and dimension. It is a narrative of concrete and symbolic terms. The story embodies how the subject of marital rape comes to the fore in formal and informal spaces. Concomitantly the accounts depict the forces that preclude a revelation of the scale of sexual violence and stifle survivors' ability to find recourse. The dissertation is a tapestry of sorts. The thread of (in)visibility allows for contradictions and irresolution to become apparent – for us to simultaneously perceive regress and progress in the law and women's recourse-seeking journeys.

Though the framework for the research rests on institutional responses, fundamentally it is about women's lives. The underlying motivation of feminist research is to consistently agitate against accepted or missing discourses on women's lives, to upset existing paradigms that concern women, and to be subversive even as it makes itself known in a broader intellectual community. As I knew that formal iterations of the law and cultural norms had bolstered the position of men over their wives until very recent times, I proceeded from the position that this history still influenced the present. Steered by Black and African feminist thought, I have incessantly posed probing questions, to dig beneath the ostensibly smooth surface of the law's progression, and to extract a more elaborate story of marital rape and of Black women's lives. And through an interpretivist research ideology, I allowed meaning to develop from perspectives of the women with whom I spoke. Throughout, I paid attention to silences relating to marital rape; silences in literature and discourse, and the silences of survivors.

In answering both the central and sub-research questions, I have refrained from portraying institutions and survivors in reductive or simplistic terms. The ecological paradigm I employed has given rise to a tapestry of themes that are full of contradictions and intricacies. The ecological framework is a tool for stepping away from linear and superficial depictions of women's circumstances. There is much to be learned at each level, but a more elaborate portrait is drawn by searching across and between the different systems and environments that make up the human experience. I have looked at the microsystem which is the family and social sphere; the macrosystem which denotes the cultural context of the individual, family and community; and the exosystem which refers to larger social and economic forces. The mesosystem has brought to light how the individual interacts with formal institutions such as community organisations, churches, police and courts.

The sub-questions that I raised touched upon each component of the ecological framework presenting both a macro and micro-view of the phenomenon of marital rape and institutions, and illustrating how the cumulative force of the systems shape survivors' lives. My answers to the questions highlight the modalities of institutions' complicity in fostering environments that allow for marital rape to flourish. In parallel, the research

sheds light on the forms of relief that these same institutions provide to survivors and the kinds of succour that survivors find meaningful and effective. Furthermore, and most importantly, my analysis discloses how women in present-day South Africa live, and have lived with extreme levels of violence in their marriages. It describes the wounds that they are carrying on and within their bodies; wounds not always immediately perceptible to the eye. Alongside the unveiling of violence, I also document survivors' agency and the steps they take to improve their existences.

9.2.1 The Legal Roots

The past bears on the contemporary framing of wives' identities and agency, or lack thereof. To provide historical context for the invisibility of marital rape, I have recounted how women's entry into the institution of marriage transformed them into the property of their husbands. That is what the law dictated, with English law referring to an irrevocable contract and Roman-Dutch law casting wives as naturally inferior beings. The traditions of some Black South African populations too nullified wives' ability to claim redress for rape by their husbands. Just as slavery positioned Black women as "both will-less and always willing,"[628] in the case of marriage in regions under an English and/or Roman-Dutch common law influence, the law shifted focus away from the violent excesses of husbands, instead ascribing women the identity of subservient and sexed beings.

Bearing in mind the importance of historical legacies, I have shown how the law held ambivalence towards marital rape into modern times, even with the passage of the Prevention of Family Violence Act (PFVA) in 1993. This provided the answer to my first research sub-question which asks: Prior to and post-1993, how have ostensibly progressive legal and policy developments contributed to a disavowal of marital rape? My interrogation of the processes around the criminalisation of marital rape expose a disinclination on the part of lawmakers to accord wives protection from sexual violence.

Though celebrated as an achievement for its undoing of the marital rape exemption, the PFVA was the poorly constructed tactic of a political party desperate to

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[628] Hartman, *Scenes of Subjection*, 81.

draw the votes of women as apartheid faded. From the 1980s onwards, South Africa lawmakers missed opportunity after opportunity to discursively confront the myths that formed the basis of the marital rape exemption, and to make clear that marital rape is a serious matter that deserves criminal justice redress just as other forms of rape do.

My critical analysis of the PFVA and its foundation uncovered that it was less about protection for women, and more about preserving the family unit. Moreover, the Act almost retained the marital rape exemption, as only the final version of the relevant provision completely criminalised marital rape. Even as the PFVA was replaced by the Domestic Violence Act (DVA), the South African Law Commission declined to meaningfully consider the issue of marital rape until wholesale rape law reform took place. Consequently, the foundation of legislative treatment of marital rape is thin and unresolved, and this ambivalence emboldened, as opposed to deconstructed, the longstanding notion that rape in marriage does not exist.

9.2.2 The Erasure of Marital Rape in Recent Judgements

Following the historical contextualising, I analysed the small universe of marital rape cases available at the High Court and Supreme Court of Appeal levels in order to answer the question: How does contemporary South African legal discourse reinforce the myth that marital rape is a lesser form of rape? Placing rape myths at the centre of my evaluation, I exposed how contemporary legal discourse mirrors the pro-marital rape exemptions sentiments of Parliamentarians and judges in the pre-PFVA era. Eschewing an uncritical portrayal of the application of rape stereotypes, I problematised rape myth theories, and utilised neutralisation theory to explain how patriarchal caricatures of rape make their way from the social sphere and into the legal sphere. The central argument I made here is that the culturally sanctioned rape myths create a common bond between rapist and judge, and they draw upon the same language and techniques to justify marital rape.

Parsing the language of sentencing determinations in three marital rape judgements (*Mvamvu*, *Modise* and *Moipolai*), I drew out the neutralisation techniques exploited by the judges to minimise the culpability of the husbands who had been

convicted of marital rape. Through the techniques of denial of injury and denial of the victim, the judges negated the human-ness and suffering of the victims. I argued that *Mvamvu* is a singularly confounding case because of how essentialist notions of Blackness and rural culture are leveraged to make light of marital rape and the resultant trauma caused to women. In this case, the Court employed discriminatory ideas of rural traditions, Blackness and gender roles to present the wife as a second-class citizen who is in effect unrapeable. Despite the affirmation of the convictions handed down by the trial courts, the tone of the three appeal judgments is replete with myths that trivialise marital rape, contributing to the invisibility of this form of violence.

I also discussed how feminists took note of the pernicious reasoning that came to light in rape decisions following the enactment of the Minimum Sentences Act of 1997, and that their critiques of *Mvamvu* and other decisions served as the basis for the limiting of judicial discretion in sentencing under the 2007 Amendment to the Act. Though it is early to tell, there are signs the courts are transforming.

9.2.3 *Ukuthwala* and Culturalism

Although the great outpouring of institutional concern and action since 2009 around the 'emergence' of violent and distorted forms of *ukuthwala* has its positive aspects, I have sought to insert a more critical perspective into the *ukuthwala* discourse. As a feminist researcher I could not rest easy, applauding the intensified media attention, jurisprudence, scholarship and community advocacy, when in fact the *ukuthwala* push is premised upon numerous problematic assumptions about violence against women. In light of my uneasiness, I methodically critiqued what I have termed the '*ukuthwala* crusade,' specifying its flaws and negative implications for collective understandings of marital rape. To this aim, I asked the question: how does institutional culturalism obscure the link between sexual violence and marriage?

To answer this question, I portrayed how the unifying message of the *ukuthwala* crusade bears the marks of culturalism – a one-dimensional way of looking at culture. The effect of the culturalist script is that it straightjackets rural Black subjects into pre-determined modes of behaviour and thought. By delineating that "authentic" *ukuthwala* is

uniformly practiced and benign, the crusade (in)visibilises women who were *thwelwe* and raped in the process decades ago. Decrying rape in *ukuthwala* as an aberrant act, the script cancels out forms of living customary law and practice. Taking comfort in the certainty of legal positivism and the imagined homogeneity and benevolence of culture, *ukuthwala* is reduced to forced child marriage, and the men who abduct and rape them are cast as lustful paedophiles, acting in flagrant violation of customary norms. The *Jezile* judgment concretises that position. The premise of the crusade is that rape in marriage is rare. Yet, I argue that *ukuthwala* symbolises the linkages between marriage and rape, with the former sanctioning the latter. *Ukuthwala* is not only a statutory rape issue, it is at its essence, a marital rape issue.

To further highlight how institutions ignore the link between sexual violence and marriage, I elucidated how the *ukuthwala* script ignores the embodiments of patriarchy in local spaces that placed women in inferior positions over generations. The nature and intensity of this patriarchy changed through the interventions and manipulations of colonialism and apartheid. My description of how cultural norms prevented women from having autonomy over their bodies in marriage is not included to make the claim that "Black culture" is entirely patriarchal. It is not, and women have always found ways to exercise their agency. But, there are embedded norms around sexual violence and marriage that stem from the past, and hold strong in the present.

9.2.4 Individual and Institutional Barriers

In the latter part of my dissertation I move into the empirical realm to present the findings from my interviews with women's rights community workers and survivors of coercive *ukuthwala*. For my findings, I commenced by asking the question: In what ways do individual and local contexts hinder women's ability to seek recourse for marital rape? As I referred to at the start of the conclusion of this dissertation, the invisibility of marital rape resonated most strongly with me as I began to interview the organisation staff. The hidden state of marital rape stems from a combination of individual conditioning, institutional positioning and structural inequality. With police, family, churches and traditional authorities reinforcing patriarchal norms of sexual violence in marriage,

women internalise the belief that their husband is superior, that he is owed sex, and that they possess little or no freedom to act autonomously.

The data illuminates that violence is an all-encompassing feature of women's lives. They live in circumstances in which they must determine how to survive against an onslaught of physical, verbal, psychological and economic abuse, and in that climate of abuse, sexual violence is not at the forefront of their minds. The correlation between other forms of abuse and sexual abuse is very high. For fear of being left economically destitute or being beaten in retaliation, some women make the decision to not fight the rapes. For these reasons, survivors tend not to volunteer information about sexual violence when they do go to non-profit organisations (NPOs) like Mosaic and Masimanyane; or they speak about sexual violence in passing.

Survivors are hard pressed to find relief from formal and informal institutions. Especially where *lobola* has been paid, and the husband supports the wife's family, families are reluctant to intervene to stop the abuse. For *ukuthwala*, rape is the norm amongst some communities. Where families and traditional authorities have benefited from the abduction, survivors can rarely rely upon them for rescue. The churches also encourage women to stay in their marriages, no matter the level of abuse. The resounding message that women receive from these institutions is that they must learn to persevere; they must learn to stay in their marriages.

Alternatively, women may try to seek help from the courts and police, but the advocacy work of Masimanyane and Mosaic signals the alarming levels of apathy, poor training and discrimination on the part of these institutions. There are police who genuinely want to do their job well, but they are ignorant of protection order procedures. More worrying is the fact that court and police personnel mock marital rape survivors – asking them how it is possible for them to be raped by their husbands. They encourage women to file protection orders as opposed to criminal charges. And, detectives are disinclined to investigate marital rape cases because of the administrative work they entail, as well as the prospect that the couple might reconcile. Overall, the (in)visibilising factors outlined in this part of this dissertation leaves an unpromising impression of the chances

that survivors of marital have to find protection. It is no wonder then, that the counsellors repeatedly spoke of how violence in the home can result in the death of the survivor. That is what is at stake for wives who are raped by their husbands.

9.2.5 Finding Relief

A contrast is necessary to that of highlighting survivors' agency and the forms of recourse that they find accessible and meaningful. After detailing the forces that invisibilise marital rape, I subsequently sought to provide answers to the question: In the face of silence surrounding sexual violence in marriage, what forms of recourse do women draw upon that positively impact their lives? My interviews with Mosaic and Masimanyane staff, and clients of Masimanyane reveals that empowerment of survivors through education and counselling is a pivotal part of their healing, but this is a process that takes time and sensitivity to survivors' mindsets and trauma. The empowerment leads to a naming of the violence, an appreciation of one's rights to dignity and equality in marriage, and conscious decision-making.

There are no typical endings for survivors, and no forms of thought or action are imposed on them by the NPOs. The philosophy of Mosaic and Masimanyane is that their clients must determine for themselves what direction they want their futures to take, for then they are more likely to follow that direction through. The organisations are merely facilitators and guides. My research also contributes a localised picture of what justice and relief mean for women. Yes, the law can play its part, and sometimes it must play its part in situations where a woman's life is immediately at risk. Nonetheless, the women's journeys delineate that well-being can be found through emotional and psychological healing. It doesn't necessarily entail a dramatic exit from the marriage, or having one's day in court.

To end the dissertation, I presented the life histories of two women who had survived violent forms of *ukuthwala*. For Anele, healing took the form of finding peace with the past and in her marriage, and growing to be an influential member of her community; a woman who empowers other women. Asanda's story attests to the longevity of the pain of coercive *ukuthwala* and marital rape, a burden that most women carry in silence. The

perspectives of women like Anele and Asanda are largely absent from the *ukuthwala* discourse, and we have to ask ourselves, why? In this regard, one of the educators under Masimanyane's *ukuthwala* project said that the erasure of survivors' voices represents "the normalisation of violence against women, period." And I agree.

9.3 Where are we Going?

At present, Mosaic and Masimanyane and other community-based groups are performing critical interventions in the lives of women who are survivors of abuse. They represent a beacon of hope, and the police and courts do too in the instances where they do what they are mandated to do. Still, one cannot help but draw the conclusion that the NPOs often do the work that the state should be doing, and that the authorities would not perform as well were it not for the constant vigilance of the NPOs.

The informants relayed that the police and courts immediately refer clients to them because of their expertise and resources. But this places an undue burden on the organisations, and detracts from the structural deficiencies of the courts and the police. As a symbiosis, the relationships between NPOs and authorities undoubtedly have their benefits. The government personnel who staff the front desks can refer clients to the NPOs so that clients are better informed about how to interact with the system and receive case assistance preparation. Working with and within government structures enables the NPOs to have influence in those spaces – to monitor the work of the courts and authorities, to advocate with the powers that be when needed, and reach a larger population of women who are in need of help.

But, what would happen if community groups Masimanyane, Mosaic, Rape Crisis, Ilitha Labantu, and People Opposing Women Abuse did not exist? And what happens to survivors who do not have access to help from NPOs, or do not know that they can receive help? How much grimmer are their prospects for finding recourse? As we take stock of the hidden nature of marital rape and the complications in bringing it to light, further research on this issue is imperative. Research with women who have not had interactions with NPOs would provide an important contrast, documenting how women address marital

rape with fewer or different resources. The present research is also region specific – covering Eastern Cape and Western Cape, as such there is significant room and need for empirical work to be undertaken in other parts of South Africa.

A few years from now it will also be interesting to see how the jurisprudence on marital rape develops. Will judges continue to follow *Mvamvu* or will the courts articulate a woman-centric view of marital rape in their reasoning? For the specific subject of *ukuthwala*, auspiciously, there is a growth of empirical studies in communities that follow the practice, and this will perhaps shift the tone of the *ukuthwala* discourse.

9.4 The Unhealed Wounds

After absorbing the findings of my desktop and empirical research, I was left to wonder about the condition of South Africa and its women and girls. The nation is steeped in violence; it is everywhere and in everything. From the numerous studies, we know much about the levels of rape that ravage South Africa, rape of women and men, of boys and girls, of babies. We know that the prevalence studies only capture the tip of the iceberg in terms of violence, and official rape statistics can only communicate so much.

From my research, I came to understand, in terms much clearer than before, how women are vessels of pain. Through their bodies, they have the ability to withstand and hide pain for a lifetime, even as their spirits wither. They do not have outlets because they are taught to be self-sacrificing – to put their families first, their husbands, and children. They must place countless responsibilities on their shoulders and still stand.

It is not surprising that there reaches a point when they must break. In the past, through acts of "insanity" and "rebellion" women in Xhosa-speaking communities could escape their marriages.[629] Thus it was only by violating the established and firm *hlonipha*

[629] The culturally prescribed methods of protest in Xhosa-speaking communities involved acts through which the *makoti* presented herself as mad and defiant – these mainly entailed direct violations of the *hlonipha* custom (see below).

rules – negating their *makoti* status – that women could literally break free from oppressive marriages without the aid of their families.[630] In the present, Black women do experience breakdowns, having reached the limit of suppressing suffering. We just do not see Black women break – as the *Mvamvu* case displayed. Black women are apparently unbreakable and unhurtable. They exhibit only slight and temporary symptoms after horrifying violence, even after being raped eight times.

There are two stories that come to mind, told to me during one of my interviews with a court counsellor at Masimanyane. The counsellor, who has worked for Masimanyane since the 1990s, was wanting to impart how most survivors of sexual violence keep things to themselves, and very few talk to anyone about being raped and abused (Interviewee 8). One client had been married through *ukuthwala* and she eventually left the marriage when her sons were grown up because the husband had abused her during the marriage. The sons had behavioural problems and during one session the client was complaining to the counsellor about them taking drugs and other things. She was an old client of the counsellor's and so they knew each other well. The counsellor responded that she hoped the children would start to behave since they were no longer teenagers, but she could see that the client was very unsettled. "I think," the client began, "they're doing this, because they are products of rape, they are product of rape." Puzzled, the counsellor asked what the client meant. "I never say yes to my husband when he sleep to me, all these years, he was just getting to bed and then open my legs and do this, and I'm getting pregnant, give birth, and then getting pregnant, and giving… they are products of rape!" she screamed in hysterics. She had kept these things to herself for so long, and they had been haunting her. The casual conversation with the counsellor triggered her, unleashing a lifetime's worth of trauma from marital rape.

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[630] The *hlonipha* custom represents an elaborate systems of rules and constraints that persons within a family are required to adhere to, and are determined by gender/age and position within the family. The rules are most stringent for newly married women as they begin life within their husband's household. For example, the makoti is prohibited from using certain names relating to their husband's family in their vocabulary, and cannot take certain routes/enter within particular parts of the homestead.

The counsellor had also told me about another woman she had encountered. The client had been suffering from chronic back and headaches. Her husband was also concerned about her because she was not interested in sex and was frequently angry and short tempered. He encouraged her to see someone. She said to the counsellor, "I'm not sick, I'm not sick but I've got this thing inside me for years. Ever since I was 11." She then told the counsellor that from the time she was 11 years old different men had sexually abused her, and that her mother had orchestrated the abuse. When she had gone to live with her mother (who was a domestic worker) and her stepfather, one day the mother said to the stepfather, "when I'm not around you must try to satisfy yourself to this child and everything." The client started crying, confused about what her mother was saying. The mother then got some Vaseline, took her panty off, and helped the stepfather to rape her. From that day on, the rapes continued. The mother also took the client to the home of the white family that she was working for, and forced her to play with the employer's penis. The employer paid the mother for these "services." Eventually the mother abandoned the daughter, left her with the white employers, and went to work in Johannesburg.

While with the white family, the client said she became the "wife" of the old man, meaning he continued to sexually abuse her. Then the son of the employer also began to sexually abuse her. She ran away when she was 16. "So Sisi… I never told anybody," she divulged to the counsellor. She was in her 30s by this time. She began to roll on the floor screaming, "this thing is eating me!!" The counsellor immediately referred her to a psychologist, and at the time of our interview the woman was still receiving psychological help. Profoundly impacted by what she had witnessed, the counsellor said that it is staggering how women can bottle things up for so many years.

If there is one thing that can be taken from the research, it is to truly appreciate the human element of the sexual violence that is documented in prevalence studies and that enters the courts in form of rape charges. Behind the "percentage," the "complainant" label or the "victim" label, it is paramount that we understand the ubiquitous nature of violence in women's lives, and how that violence shapes them and moulds them. The law has its limitations in humanising its subjects, and this is why empirical work is so critical.

The present research makes known some of the forms of marital rape, and other abuse, to which women are subjected, and how they navigate extremely hostile spaces. Some are fortunate enough to find relief and to speak of their suffering. But, the majority of women who endure marital rape will keep their silence, and tuck the violence under a shroud of feigned strength; strength that is so often taken for granted in Black women.

INDEX 1: IN-DEPTH INTERVIEW QUESTIONNAIRE FOR MOSAIC AND MASIMANYANE STAFF

Nyasha Karimakwenda
Law Faculty, University of Cape Town
Supervisor: Dee Smythe

Guide for Interviews with Organisation Staff

- What is your full name?
- What is your professional title at _____?
- What responsibilities do you have as part of this job?
- How long have you worked at _____?
- Did you hold previous positions at _____?
- What were your duties when you held those positions?
- For how long have you been working with survivors of sexual violence?
- What made you interested in doing this kind of work?
- What kinds of sexual violence cases do you tend to assist with most frequently?? (rape by strangers, intimate partner violence, child abuse etc.?)
- How do your clients generally come to learn about the work that _____ does?
- What kinds of services do they seek from you?
- How often do you learn of cases of marital rape?
- Based on your work in this community, how do people view marital rape? Do they talk about it? Do they see it as rape?
- Under what circumstances do marital rape survivors seek assistance from your organisation?
- What kinds of services are marital rape survivors looking for when they come to you?
- What kinds of help did they seek before coming to you (family, police, traditional leaders, clinic etc.)?
- What kinds of help are you able to provide to them or refer them to?
- What are some of the challenges that these women face in obtaining help for the abuse?
- Are the challenges that wives face different to those of other rape survivors? If yes, how?
- Based on your experience, what do you see as being the most effective sources of recourse for women who are experiencing rape by their husbands?
- What sources of recourse are not so helpful?
- What are some of the outcomes of cases of marital rape that you or Masimanyane has assisted with?
- Is there anything else you would like to add?

INDEX 2: ETHICAL CLEARANCE GRANTED BY UNIVERSITY OF CAPE TOWN

Faculty of Law

Research Ethics Committee

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08 November 2016

Ms Nyasha Karimakwenda
c/o Prof Dee Smythe's office
Department of Public Law, Room 6.41
Kramer Law Building, Faculty of Law, UCT
Cell: 079 288 6807
Email: nyasha1@gmail.com

Dear Ms Karimakwenda

Re: Clearance Process for L0031-2016: *"Where rape does not exist: unearthing women's means of addressing sexual violence in marriage"*

Thank you for the revised application submitted to the REC's administration office via the online system. This study has been carefully considered and all ethical issues have been adequately addressed.

Ethics clearance is hereby granted as of 07 November 2016 and is subject to renewal for another 12 months.

Please note that any material changes to the proposal will need to be cleared as an amendment.

Kindly quote the above reference number as well as your student number when communicating with the REC regarding this application.

With best wishes,

PP
ASSOCIATE PROFESSOR JULIE BERG
LAW REC: CHAIRPERSON

cc: Prof D Smythe, Public Law Dept, UCT

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